

SHIFTING INSTITUTIONAL PARADIGMS TO ADVANCE SOCIO-ECONOMIC
RIGHTS IN AFRICA

by

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I declare that SHIFTING INSTITUTIONAL PARADIGMS TO ADVANCE SOCIO-ECONOMIC RIGHTS IN AFRICA is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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SIGNATURE

(MR N J UDOMBANA)

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DATE

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DEDICATION

I dedicate this thesis to my wife and children.

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ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AEC	African Economic Community
AU	African Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
COMESA	Common Market for Eastern and Southern Africa
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
ECA	Economic Commission for Africa
ECHR	European Convention on Human Rights
ECOSOC	(UN) Economic and Social Council
ECOSOCC	(AU) Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
ESC	European Social Charter
EU	European Union
GA	General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission

ILM	International Legal Materials
ILO	International Labour Organisation
IMF	International Monetary Fund
LDC	Least Developed Countries
NEPAD	New Partnership for Africa's Development
NGO	Non-governmental Organisation
OAU	Organisation of African Unity
PAP	Pan-African Parliament
PICJ	Permanent Court of International Justice
PSC	Peace and Security Council
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNTS	United Nations Treaty Series
WTO	World Trade Organisation

ABSTRACT

The thesis offers new paradigms for advancing socio-economic rights in Africa. Many States Parties to human rights instruments have failed to promote the common welfare of their citizens partly because of the justiciability debate, which continues to complicate intellectual and practical efforts at advancing socio-economic rights. The debate also prevents the normative development of these rights through adjudication. Furthermore, traditional human rights theory and practice have been state-centric, with non-state actors largely ignored in the identification, formulation, and implementation of human rights norms. Yet, the involvement of non-state entities in international arena has limited states' autonomies considerably, with serious implications for human rights. Transnational Corporations (TNCs) have capacities to foster economic well-being, development, technological improvement, and wealth, but they also often cause deleterious human rights impacts through their employment practices, environmental policies, relationships with suppliers and consumers, interactions with governments, and other activities.

The thesis argues that socio-economic rights are normative and justiciable. It argues that traditional approaches are no longer sufficient to secure human rights and calls for a dismantling of some structures erected by doctrinal systems; for realignment of relationships among social institutions; and for integrated bundles of fundamental interests that harness benefits of human rights norms and widen the landscape to commit both formal and informal regimes. Fashioning out a new paradigm for advancement of socio-economic rights requires addressing state capacity. It requires an integrative and global interpretive framework. It requires, finally, a new paradigm to commit non-state

actors in Africa. The illustrative chapter uses the rights to work and to social security as templates for some prescriptions towards realising socio-economic rights in Africa.

INTRODUCTORY

1. Background

Contemporary international law response to human wrongs began after World War II, in reaction to the destruction and expendability of human beings that characterised that war. The human rights order erected from the ashes of that war later became a product of the preferences of the Cold War inter-State community, which focused on civil and political rights under the heavy impact of the “voice of the North”. Phenomena such as poverty, malnutrition, destitution, illiteracy, and unemployment were not then on the front burner of international law and politics. Even where positive international and municipal law recognised these phenomena as rights, the international community treated them as orphans in the human rights family, according socio-economic rights¹ second-class status in practice. As Chapman puts it: “Despite a rhetorical commitment to the indivisibility and interdependence of human rights, the international community, including the international human rights movement, has consistently treated civil and political rights as more significant, while consistently neglecting economic, social and cultural rights”.²

¹ Throughout this thesis, I shall employ the term ‘socio-economic rights’ rather than the standard “economic, social, and cultural rights”, because the focus is on protections like health, food, education, housing, work, social security, rather than cultural rights.

² AR Chapman ‘A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights’ (1996) 18 *Human Rights Quarterly* 23 26. Cf M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995) 9 (observing that socio-economic rights in practice have been “largely ignored”); P Alston ‘Economic and Social Rights’ in L Henkin & JL Hargrove (eds) *Human Rights: An Agenda for the Next Century* (1994) 137 149 (“[T]here is not a single important indicator that would show anything other than the relative neglect, and often also the absolute neglect, of economic, social and cultural rights in practice”).

Every now and then, debates still spring up on the justiciability of socio-economic rights, that is, the question whether courts can, and at least sometimes will, provide a remedy for aggrieved individuals claiming a violation of those rights. Others argue that socio-economic rights are fundamentally different from civil and political rights and that attempts to describe economic and social concerns as rights are misguided, but as this thesis seeks to demonstrate, it is the attempt to deny normative entitlements to these concerns that are misguided.

In Africa, the then Organisation of African Unity (OAU), reconstituted into the African Union (AU) in 2000, worked assiduously to develop international human rights law, including those on socio-economic rights. The African Charter on Human and Peoples' Rights,³ adopted, paradoxically, by a poverty-stricken region, remains exemplary in this regard. Many states have also incorporated socio-economic rights into their basic, constitutional law, foremost of which is the South African Constitution of 1996. Problems, however, remain in the actualisation of these rights. Many governments have notoriously failed to promote the common welfare of their citizens, taking cold comfort in bland arguments that socio-economic rights require costly programmes for their realisation.

Discourses on implementation of socio-economic rights have often focused on the role of courts. Of course, courts can, should, and, indeed, do play pivotal roles in advancing rights by interpreting and enforcing relevant human rights instruments. Such interpretations help governments to understand their obligations, the positive consequences for implementing them and negative ones for non-implementation.

However, like in many other regions, the justiciability debate continues to complicate intellectual and practical efforts at advancing these rights. It also acts as a self-fulfilling prophecy, by preventing the normative development of these rights through adjudication.⁴

Traditional human rights theory and practice have been state-centric, understandably because, in the absence of legal restraints, states wield absolute socio-economic and legal power over the individual.⁵ Non-state actors—all actors operating at a sub-state or transnational level⁶—have largely been ignored in the identification, formulation, and implementation of human rights norms, including those on socio-economic rights. Yet, the involvements of these actors in international economic and, sometimes, political arenas have limited states' autonomies considerably, with serious implications for human rights. Transnational corporations (TNCs), in particular, have, on the one hand, capacities to foster economic well-being, development, technological improvement, and wealth and, on the other, capacities to cause deleterious human rights impacts on the lives of individuals through their employment practices, environmental policies, relationships with suppliers and consumers, interactions with governments, and other activities.

³ See African Charter on Human and Peoples' Rights adopted 27 June 1981 entry into force 21 Oct 1986 Doc OAU/CAB/LEG/67/3/Rev.5 (1982) 21 *International Legal Materials* 59 [hereinafter African Charter or Charter].

⁴ See D Marcus 'The Normative Development of Socioeconomic Rights through Supranational Adjudication' (2006) 42 *Stanford Journal of International Law* 53 55 (arguing: "The perception of non-justiciability and the normative underdevelopment of socioeconomic rights act as codependent parts of a negative feedback mechanism: States oppose adjudication because the rules of decision are vague and imprecise, and these characteristics prevent the application of the 'judicial craft' to clarify and develop their content").

⁵ See F Raday 'Privatising Human Rights and the Abuse of Power' (2000) 13 *Canadian Journal of Law & Jurisprudence* 103 108-10.

⁶ Thus broadly defined, non-state actors include individuals, corporations, intergovernmental organizations, armed groups—such as insurrectional movements—and other organized entities. See JA Hessbruegge 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 *Buffalo Human Rights Law Review* 21 22. In the context of this thesis, non-state actors will be limited to transnational corporations (TNCs) and non- and inter-governmental organisations.

2. Purpose and Assumptions

This thesis seeks to fill in some gaps in the existing literature on socio-economic rights, by offering new paradigms or propositions for their advancement in Africa. Paradigms are key theories, instruments, values and metaphysical assumptions that comprise a disciplinary matrix. Fourez defines a paradigm as a mental structure, conscious or not, that is useful to classify the world and approach it.⁷ Thus, while the thesis affirms the continued relevance of traditional approaches, including roles of governments as representatives of public interest and of courts as guardians of fundamental freedoms, it will argue that these approaches are now insufficient. It calls for the dismantling of some structures erected by doctrinal systems; for a realignment of relationships among social institutions; and for integrated bundles of fundamental interests that harness benefits of human rights norms and widen the landscape to commit both formal and informal regimes. TNCs, in particular, must become catalysts for socio-economic transformation and combating of social exclusion especially in Africa, given the absence of strong institutional structures for realising socio-economic rights.

This thesis is based on some assumptions and/or fundamentals. The first is that socio-economic rights are *normative*, that is, they are standards or principles deemed to be binding on members of a group and guiding and regulating acceptable behaviour in a society. The second assumption is that human rights theory is an experimental science; like medical science, its goal is to prevent or cure particular forms of diseases or disabilities, not merely to describe, or make verbal commitments to, certain normative

instruments. *A fortiori*, socio-economic rights guarantees are meaningless in Africa if they do not have practical impacts on lives and livelihoods of Africans.

The third and related assumption is that socio-economic rights are implementable in Africa, a truth that was not lost on the OAU when it declared in 2001:

The resources, including capital, technology and human skills, that are required to launch a global war on poverty and underdevelopment exist in abundance [in Africa], and are within our reach. What is required to mobilise these resources and to use them properly, is bold and imaginative leadership that is genuinely committed to a sustained human development effort and poverty eradication.⁸

This thesis will argue that by changing and/or modifying our institutional frames of reference, that is, by looking at the same problem from a different point of view, we could change the way we respond to socio-economic rights challenges in Africa. The thesis employs Keohane's definition of 'institutions', as "persistent and connected sets of rules (formal and informal) that prescribe behavioural roles, constrain activity, and shape expectations. They can take the form of formal intergovernmental or non-governmental organisations, international regimes, or informal conventions".⁹

⁷ See G Fourez *A Construção Das Ciências (The Construction of Sciences)* (1995) 103. See, in general, T Kuhn *A Estrutura Das Revoluções Científicas (The Structure of Scientific Revolutions)* (1997).

⁸ See OAU The New Partnership for Africa's Development (Oct 2001) [hereinafter NEPAD] para 6 available at www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oau/keydocs/NEPAD.pdf.

⁹ R Keohane & L Martin 'Institutional Theory, Endogeneity and Delegation' (April 1999) *Working Paper Series* No 99-07 Weatherhead Center for International Affairs Harvard University 2.

3. Methodology

The methodology is largely desktop, involving a systematic survey and exposition of available materials and literature, drawing logical conclusions and offering relevant prescriptions. The research relies on primary and secondary sources, including human rights treaties and constitutional provisions. It employs the jurisprudence of global, regional and national human rights institutions, and soft laws as aids to interpretation. It is empirical comparative, establishing how other legal systems address similar issues, and relies on textual-analytical, teleological and systematic methods of treaty and constitutional interpretations. Although the thesis' accent is on sequential logic, it employs social narratives to interrogate legal narratives. An interdisciplinary methodology is necessary to respond to challenges posed by socio-economic rights in Africa.

Few of the comparatively large body of literature on socio-economic rights are written from an Africanist perspective. This thesis, therefore, is unashamedly Africanist in its length and breadth. There are, of course, some dangers in “broad prognostications” and “sweeping conclusions” on human rights issues in Africa, given “the internal dynamics of individual countries”¹⁰ and variations in political and ideological orientation. However, many states exhibit certain homogeneity to allow for drawing of some uniform conclusions on what is usually termed Sub-Saharan Africa (SSA).¹¹ Among these are their post-colonial status; their *a priori* problematic relationship on their territorial

¹⁰ J Oloko-Onyango ‘Human Rights and Sustainable Development in Contemporary Africa: A New Dawn or Retreating Horizons?’ (2000) 6 *Buffalo Human Rights Law Review* 39 40-41.

¹¹ Some employ the term “Sub-Saharan Africa” (SSA) to describe those countries of Africa that are not considered part of North Africa. This division has also arisen from historical and geopolitical considerations. The West generally perceives North Africa’s inhabitants to be predominantly Caucasoid. However, the exact position of the dividing line between the two regions remains blurred due to break points between national boundaries, ecologies, and ethnicities.

jurisdictions; their heavy involvement in a restricted resource base—primarily agricultural; their relatively undifferentiated albeit ethnically heterogeneous social infrastructure; the centralisation and consolidation of power by the post-colonial inheritance elites; and the pervasive external context and dependency.¹²

4. Scope of Study

The thesis has six main chapters, excluding the summary and conclusion. Chapter One provides the theoretical foundation; it revisits debates on the normativity of socio-economic rights, as a platform for literature review. I conclude by re-affirming the indivisibility and interdependence of *all* rights. Chapter Two examines the notion of obligations, focussing on states as duty bearers and interrogating the minimum contents of such obligations in relation to socio-economic rights. Chapter Three examines the nature of post-colonial African states and institutions and the implications of weak structures and other pathologies on socio-economic, indeed all human, rights. Since the realisation of human rights largely depends on the manifestations of state power, I argue that any serious attempt to fashion out a new paradigm for the advancement of socio-economic rights must address state capacity. Chapter Four interrogates the role of courts, as agents of states, in the implementation of socio-economic rights and call for an integrative and global interpretive framework.

Chapter Five interrogates the role of non-state actors and attempts to establish a legal and moral framework to commit such actors internationally and domestically. I argue for a paradigm shift on obligations to make for the legal attribution of responsibilities on

¹² See M Doornbos 'The African State in Academic Debate: Retrospect and Prospect' (1990) 28(2) *The Journal of Modern*

non-state actors for breaches of human, in particular socio-economic, rights in an increasingly globalised and liberalised society. Chapter Six is an illustrative study; it applies principles in previous chapters to rights to work and to social security in Africa and attempts some prescriptions for the visible realisation of these rights. The final chapter—Summary and Conclusion—reflects on key themes of this thesis.

Chapter One

LITERATURE REVIEW:

SOCIO-ECONOMIC RIGHTS AS NORMATIVE STANDARDS

1.1 Introduction

The notion of rights has been a subject of much legal and philosophical speculation; it defies definition. The reason for the elusiveness of definition is that such questions as rights are intrinsically ambiguous. The same form of words may be used to demand a definition or the origin, cause or purpose, of a legal institution.¹ Thus, the term ‘right’ may be used to describe a variety of legal relationships, each invoking different protections and producing variant results. Sometimes the term is used in the strict sense of a right-holder’s claim to something, with a correlative duty in another. It is used at other times to indicate a privilege or liberty to do something. Still on other occasions, it stands for immunity from having one’s legal status altered by another person’s act. Lastly, the word may refer to a power to alter the legal relations—rights and duties—of others.²

¹ See, in general, HAL Hart *Definition and Theory in Jurisprudence* (1953).

² See, in general, WN Hohfeld *Fundamental Legal Conceptions* (1919). Commentators on Hohfeld’s system have often proposed minor variations in terminology. For example, Hohfeld used the word “right” and “no-right” in place of the words “claim” and “no-claim”, since he considered the correlative of a duty to be a reasonable synonym. He used the word “privilege” for the opposite of a duty, although he suggested “liberty” as a possible synonym; but one problem with the word “privilege” is that it also connotes a special legal advantage. Furthermore, Hohfeld used the word “disability” for the opposite of a power; but might the word “no-power” be a better substitute, to emphasise the structural similarity to the concept of a “no-claim”?

As “claim” rights, “human rights” are entitlements that individuals make on the society by virtue of their humanity;³ or, to use Gewirth’s exact phrase, “rights which all persons equally have simply insofar as they are human”.⁴ Human rights are fundamental and hence inalienable or unalienable; otherwise stated, they are not awarded by human power and so cannot be surrendered. As ethical standards that uphold the minimum thresholds individuals everywhere require to live in dignity, human rights serve as ends and means. They provide their holders with an “argumentative threshold” against probable objections,⁵ “trump[ing] over some background justification for political decisions that states a goal for the community as a whole”.⁶

A fundamental right may be infringed by limiting protected activities or by failing to fulfil a positive obligation, which explains why contemporary scholarship generally distinguishes between different categories of rights—civil and political, on the one hand, and economic, social, and cultural rights on the other. Certain terms of art are used to denote these classifications. Civil and political rights are termed libertarian, that is, rights relating to the exercise of free will. Economic, social, and cultural rights are termed egalitarian, in that they relate to social equality and the just distribution of economic and social goods. Sometimes, this classification is also denoted in terms of negative and positive rights or freedoms.

³ See L Henkin ‘Human Rights’ in R Bernhardt (ed) *Encyclopaedia of Public International Law* (vol 1 1992) 886.

⁴ A Gewirth ‘The Epistemology of Human Rights’ in P Frankel *et al* (eds) *Human Rights* (1984) 1.

⁵ See D Lyons ‘Utility and Rights’ in D Lyons (ed) *Rights, Welfare, and Mill’s Moral Theory* (1994) 147 152.

⁶ R Dworkin ‘Rights as Trumps’ in J Waldron (ed) *Theories of Rights* (1984) 153 153. Cf R Dworkin *Taking Rights Seriously* (1977) xi (referring to rights as ‘trumps’, that is, their claims take precedence over considerations about the maximizing of social utility).

The notion of libertarian freedom is associated with the classical political philosophers, such as Locke, Hobbes, Smith, and Mill. Egalitarian freedom is associated with thinkers such as Hegel, Rousseau, Herder, and Marx. The libertarian theory claims that there are only “negative” rights, with duties correlating with rights⁷ and requiring each person to refrain from interfering with another’s freedom. Berlin defines negative liberty as the absence of constraints on, or interference with, agents’ possible action⁸ and positive liberty as self-mastery or the capacity to determine oneself, that is, to be in control of one’s destiny.⁹ Or to borrow Fabre’s characterisation: “[N]egative rights ground negative duties of non-interference, they are not assigned to scarce goods and therefore do not conflict with one another; by contrast . . . positive rights ground positive duties to help and resources”.¹⁰

Socio-economic rights, which are the subjects of this enquiry, are often regarded as positive because “they enhance the power of the government to do something for the person, to enable her or him in some way”.¹¹ “Social rights” give people security, as they live together and learn together; “social and economic rights” give people social and economic security, including the right to food, shelter and health. Both categories of

⁷ See S van Duffel ‘Libertarian Natural Rights’ (2004) 16(4) *Critical Review* 353.

⁸ I Berlin *Four Essays on Liberty* (1969) 121-2 (asking, “What is the area within which the subject—a person or group of persons—is or should be left to do or be what he is able to be, without interference by other persons?”).

⁹ Above, 122 (asking, “What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?”).

¹⁰ C Fabre ‘Constitutionalising Social Rights’ (1998) 6 *Journal of Political Philosophy* 263 264.

¹¹ NJ Udombana ‘Articulating the Rights to Democratic Governance in Africa’ (2003) 24 *Michigan Journal of International Law* 1209 1224.

rights “display a highly social orientation in the sense that they evolve to temper the equally highly individualistic orientation of first-generation rights”.¹²

This Chapter defends the position that socio-economic rights constitute binding force of law or are parts of laws that can be broken or responded to in a non-determinative way. It argues that problems associated with these classes of rights are those of *applicability*, not *validity*,¹³ a distinction that is vital for clear and logical reasoning. Often, rights-holders are unable to exercise their rights for a number of reasons, such as economic indigence and the social and political vulnerability of rights holders. Regarding economic indigence, available statistics show that the majority of Africans live in absolute poverty.¹⁴ (Poverty, in this sense, is defined in terms of per capita income, though such a criterion is usually defective for not taking into account other dimensions, such as lack of empowerment, opportunity, capacity and security.)¹⁵ Regarding social and political vulnerability of the rights-holder, Raz writes:

People will go to court and insist on their rights only if they believe that they will not as a result lose their jobs and become unemployable, that their children will neither be expelled from their schools, nor persecuted in them, that their houses or cars will not be fire-bombed, etc.¹⁶

¹² Above.

¹³ See M Scheinin ‘Economic and Social Rights as Legal Rights’ in A Eide C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (1995) 29.

¹⁴ See, in general, World Bank *World Development Report 2000/2001: Attacking Poverty* (2000).

¹⁵ See ‘More or Less Equal?’ *The Economist* 13 Mar 2004 73 75 (arguing that the “dollar-a-day threshold” for measuring poverty is “a crowded part of the global income distribution”).

¹⁶ J Raz ‘The Importance of Rights and their Limits’ in A Sajo (ed) *Western Rights? Post-Communist Application* (1996) x.

1.2 The Problematic

Certain policy makers, scholars, and segments of the civil society contest the claim that *all* human rights are normative and obligatory. Some even caution that a contrary claim could undermine the protection of those rights that are uncontroversial, presumably civil and political.¹⁷ According to critiques, an entitlement qualifies as a human right if it is fundamental and universal, definable in justiciable form, clear on who has the duty to uphold or implement the right, and has a responsible agency with capacity to fulfil its obligation in relation to the right.¹⁸ Since socio-economic rights do not meet these criteria, critiques conclude, they do not qualify as ‘legal’ rights.

Thus, when some Western governments include the promotion of human rights in their foreign policy goals, their concerns are for basic freedoms—respect for life and limb, personal liberty, freedom of religion, conviction, movement, information and expression—rather than some ‘nebulous’ phenomena as poverty, malnutrition, disease, destitution, illiteracy, or unemployment. Even those governments that support equal status for socio-economic rights have generally failed to take steps necessary to provide concrete protections.¹⁹ Yet, these Western countries are not immune from the morbidities that afflict the rest of humanity. The 2005 Katrina disaster in the United States (US)

¹⁷ See eg D Miller (ed) *The Blackwell Encyclopaedia of Political Thought* (1987) 224 (“Declarations of rights have sometimes been presented as statements of self-evident truths which therefore require only to be announced. This approach is, at best, implausible and invites the opponent of human rights to dismiss them as no more than a set of prejudices”).

¹⁸ See D Beetham ‘What Future for Economic and Social Rights?’ (1995) 43 *Political Studies* 41 41-42. Cf EW Vierdag ‘The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights’ (1978) 9 *Netherlands Yearbook of International Law* 69 (“In order to be a legal right, a right must be legally definable; only then can it be legally enforced, only then can it be said to be justiciable”).

¹⁹ See S Leckie ‘The U.N. Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach’ (1989) 11 *Human Rights Quarterly* 522 525-26 (discussing the relative lack of state

demonstrated that “the rich also cries”; it exposed the terrible vulnerability of some of its populations—mostly African-Americans. Sen rightly maintains that:

The richer countries too often have deeply disadvantaged people, who lack basic opportunities of health care, or functional education, or gainful employment, or economic and social security. Even within very rich countries, sometimes the longevity of substantial groups is no higher than that in much poorer economies of the so-called third world.²⁰

Where certain international instruments seek to protect socio-economic rights, states generally interpret them as programmatic clauses, obligating governments and legislatures to pursue economic and social policies without creating individual claims. The problem started during the drafting of the international human rights covenants. The United Nations (UN) Commission on Human Rights (CHR), recently reconstituted into the Human Rights Council, was split on the question of whether to elaborate one or two covenants to give legal effects to the rights guaranteed in the Universal Declaration of Human Rights (UDHR).²¹ When the General Assembly (GA) was seized of the question in 1950, it emphasised the interdependence of all categories of rights and called on the CHR to adopt a single covenant.²² The CHR itself came to favour this line of thought,

action in spite of numerous resolutions affirming the indivisibility of human rights and the legal validity of socio-economic rights).

²⁰ See A Sen *Development as Freedom* (1999) 15.

²¹ See Universal Declaration of Human Rights adopted 10 Dec 1948 GA Res 217 A (III) GAOR 3d Sess [hereinafter UDHR] pmb.

²² See GA Res 421(V) of 4 Dec 1950.

insisting that all rights are deserving of equal protection and thus “all rights should be promoted and protected at the same time”.²³

By 1952, however, Western states succeeded in lobbying the GA to reverse the decision. The GA asked the CHR to divide the rights contained in the UDHR into two separate covenants.²⁴ The result of this Cold War aberration was the two Human Rights Covenants: the International Covenant on Civil and Political Rights²⁵ and the International Covenant on Economic, Social and Cultural Rights.²⁶ These two instruments, together with the UDHR, constitute the international bill of rights.

Finally, when non-governmental organisations (NGOs), especially first-generation NGOs,²⁷ campaign against abuses of human rights by states, they invariably focus on protection of life, limb, and liberty, arguably because the human rights movement evolved out of concern for political dissidents. Some leading international NGOs have been openly hostile to the idea of recognizing socio-economic concerns as legal entitlements. Human Rights Watch (HRW), for example, considered socio-economic concerns as “equities” and advanced what Mutua calls “its own nebulous interpretation of ‘indivisible human rights’ which related civil and political rights to survival, subsistence,

²³ Annotations on the Text of the Draft International Covenants on Human Rights UN GAOR 10th Sess Annex Agenda Item 28 pt II ch V at 8 UN Doc A/2929 (1955).

²⁴ See M Nowak *Introduction to the International Human Rights Regime* (2003) 78-9. See also J Morsink *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (1999) ch 1 (for an in-depth discussion of the drafting process and ultimate decision to divide the Covenant into two treaties).

²⁵ See International Covenant on Civil and Political Rights adopted 16 Dec 1966 entry into force 23 Mar 1976 GA Res 2200 A (XXI); UN GAOR 21st Sess Supp No 16 UN Doc A/6316 (1966) 999 UNTS 171 [hereinafter ICCPR].

²⁶ See International Covenant on Economic, Social and Cultural Rights adopted 16 Dec 1966 entry into force 23 Mar 1976 993 UNTS 3 [hereinafter ICESCR].

²⁷ The first-generation NGOs included Amnesty International, the International Commission of Jurists, and Human Rights Watch. The notable exception in terms of advocacy for socio-economic rights was the New York based Centre for Economic and Social Rights. For a critique of NGOs and their restrictive mandates, see J Gathii & C Nyamu Note,

and poverty, ‘assertions’ of good that it did not explicitly call rights.”²⁸ In 1993, Aryeh Neier, then Executive Director of HRW, expressed a position that probably reflected the ideology of first generation human rights NGOs. According to Neier:

When it comes to the question of what are called economic rights, I’m on the side of the spectrum which feels that the attempt to describe economic concerns as rights is misguided. I think that when one expresses this opinion, it is often thought that one is denigrating the significance of economic misery and inequities. I would like not to be accused of that. I regard economic equity and economic misery as matters of enormous significance. I just don’t think that it’s useful to define them in terms of rights.²⁹

The next segment examines some traditional claims against socio-economic rights, as a template for literature review. It asserts that socio-economic rights are human rights, embodying legal obligations and entrusting their holders with powers to enforce them, whether or not they actually do so.³⁰

‘Reflections on United States-Based Human Rights NGOs’ Work on Africa’ (1996) 9 *Harvard Human Rights Journal* 285 291.

²⁸ M Mutua ‘The Ideology of Human Rights’ (1996) 36 *Virginia Journal of International Law* 589 618.

²⁹ A Neier *Remarks to East Asian Legal Studies & Human Rights Program Symposium* (Harvard Law School) (8 May 1993) in *Human Rights and Foreign Policy: A Symposium* (1994) 16 cited in Mutua ‘The Ideology of Human Rights’ (note 28 above) 618.

³⁰ See Raz (note 16 above) ix (arguing, however, that, the exercise of legal rights are subject to the extent to which courts are willing to enforce them and that courts do not often fulfil their functions as enforcers of rights, “given the nature of their political culture, and the forms of recruitment to the judiciary and the terms of service of judges; as above, x).

1.3 Examining the Claims

Critics assert that socio-economic rights are incapable of meeting the purported criteria for recognition as human rights. They argue that such ‘rights’ are not justiciable, that is, they are not such that courts could provide a remedy for aggrieved individuals claiming their violations.³¹ They claim that socio-economic rights are mutually exclusive *vis-à-vis* civil and political rights; that they are couched in language that makes their judicial enforceability difficult, if not impossible; and that they require costly programmes of positive state action for their implementation. How could we treat a thing that depends on the availability of, often, scarce and unpredictable resources as a right in the real sense of the term?

For analytical convenience, these claims could be labelled the divisibility, policy, vagueness and cost arguments. I shall interrogate each of these arguments in turn, but with liberty to take reasoned personal positions. I will argue that the justiciability debate is more ideological or cultural than jurisprudential.

1.3.1 *The Divisibility Argument*

Arguments on the divisibility of human rights have bearings on the justiciability of socio-economic rights. Some Western States have failed to ratify a number of treaties dealing with socio-economic rights on the ground that they are merely “aspirational”. During the

³¹ For views on justiciability, see, in general, *Report of the Expert’s Roundtable Concerning Issues Central to the Proposed Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2002); M Craven ‘The Justiciability of Economic, Social and Cultural Rights’ in R Burchill D Harris & A Owers (eds) *Economic, Social and Cultural Rights: Their Implementation in UK Law* (1999) 1; De Vos P ‘Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa’s 1996 Constitution’ (1997) 13 *South African Journal of Human Rights* 67; M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995); C Scott & P Macklem ‘Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution’ (1992) 141 *University of Pennsylvania Law Review* 1; and Vierdag (note 18 above).

Cold War, the US Government classified this category of entitlements as a socialist manifesto thinly veiled in the language of rights. Except for the Carter and, to a limited extent, Clinton administrations, every post World War II US Administration has treated socio-economic rights with scepticism, sometimes with open hostility. The Reagan administration particularly took the view that these concepts were “societal goals” rather than human rights,³² which probably explains why the US has failed to ratify ICESCR, though President Carter signed it in 1977.³³

Whatever else is true, it is emphatically not true that socio-economic, civil and political rights are mutually exclusive; rather, the contemporary norms of human rights form an indivisible and interdependent whole. “The linkages between different types of freedom,” says Sen, “are empirical and causal, rather than constitutive and compositional”.³⁴ Designers of the UDHR—the world’s Magna Carta—were definitely conscious of these linkages when they included civil and political as well as socio-economic rights as integrated and interrelated scheme of rights.³⁵ The UDHR declares: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”,³⁶ and there is no reason why this right to an effective remedy should apply only to civil and political rights.

³² See US statement in UN Doc A/40/C3/36 5 (1985). See also B Stark ‘Economic Rights in the United States and International Human Rights Law: Toward an ‘Entirely New Strategy’ (1992) 44 *Hastings Law Journal* 79 82.

³³ See NH Kaufman *Human Rights Treaties and the Senate: A History of Opposition* (1990) 74-78.

³⁴ See Sen (note 20 above) xii (arguing, “there is strong evidence that economic and political freedoms help to reinforce one another, rather than being hostile to one another (as they are sometimes taken to be”).

³⁵ See, in general, UDHR (note 21 above) art 3-21 (covering civil and political rights) and art 22-28 (covering economic, social and cultural rights).

³⁶ Above, art 8.

As previously stated, the two treaties that implement the UDHR—the ICCPR and ICESCR—divide the rights into separate documents, but they both declare that the full and equal enjoyment of all human rights is a prerequisite to human freedom.³⁷ Both the UN Declaration on the Right to Development (DRD)³⁸ and the Convention on the Rights of the Child (CRC)³⁹ adopt integrated approaches to human rights and reinforce their indivisibility and interdependence. The DRD, which is a norm-candidate on the right to development, provides: “All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights”.⁴⁰

The CRC was the first universal human rights treaty to integrate civil, political, economic, social and cultural rights. It deals with four broad categories of rights. The first category is survival rights, such as adequate food, shelter, clean water and primary health care. The second category is protection from abuse, neglect and exploitation, such as the right to special protection in times of war. The third category is developmental rights, such as the upbringing of a child in a safe environment, through formal education, constructive play and advanced health care. The last category is participatory rights, such as a child’s participation in the social, economic, religious and political life of the

³⁷ See ICCPR (note 25 above) pmb1 (“Recognizing that, in accordance with the [UDHR], the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights...”); and ICESCR (note 26 above) pmb1 (“Recognizing that, in accordance with the [UDHR], the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights...”).

³⁸ Declaration on the Right to Development GA Res 41/128 4 Dec 1986 [hereinafter DRD].

³⁹ Convention on the Rights of the Child adopted 20 Nov 1989 UN Doc A/44/736 (1989) 1577 UNTS 3 *reprinted in* (1989) 28 *International Legal Materials* 1457 [hereinafter CRC].

community, expression of opinions, and the right to a say in matters affecting the child's life.

The international community reaffirmed the indivisibility and interdependence of all human rights during the 1993 World Conference on Human Rights held in Vienna. The subsequent Vienna Declaration and Programme of Action clearly stated:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁴¹

Some regional human rights instruments also bridge the dualities between civil and political rights and their socio-economic counterparts. This integration is probably the most significant contribution that the African Charter on Human and Peoples' Rights⁴² makes to the development of international human rights.⁴³ The Charter predates the CRC and other universal human rights treaties that also integrate all rights. The imperative to

⁴⁰ DRD (note 38 above) art 6(2).

⁴¹ Vienna Declaration and Programme of Action A/CONF157/23 12 July 1993 para 5 (1993) 32 *International Legal Materials* 1661.

⁴² See African Charter on Human and Peoples' Rights adopted 27 June 1981 entry into force 21 Oct 1986 Doc OAU/CAB/LEG/67/3/Rev5 (1982) 21 *International Legal Materials* 59 [hereinafter African Charter or Charter].

integrate all rights in Africa predates even the African Charter. In 1979, the then OAU mandated its Secretary-General to organise a meeting of experts to prepare a preliminary draft of an African human rights treaty.⁴⁴ The document containing that mandate stressed, *inter alia*,

the importance that the African peoples have always attached to the respect for human dignity and the fundamental human rights bearing in mind that human and peoples' rights are not confined to civil and political rights but cover economic, social and cultural problems and that the distinction between these two categories of rights does not have any hierarchical implications but that it is nevertheless essential to give special attention to economic, social and cultural rights in future.⁴⁵

Thus, rather than distinguish between the various categories of rights, the African Charter affirms the indivisibility and interdependence of all human rights in these eloquent words:

[I]t is henceforth essential to pay a particular attention to the right to development and ... civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of

⁴³ See F Viljoen 'Africa's Contribution to the Development of International Human Rights and Humanitarian Law' 1 *African Human Rights Law Journal* (2001) 18 20.

⁴⁴ See OAU Decision on Human and Peoples' Rights in Africa AHG/Dec 115 (XVI) Rev1 (1979) para 2(b).

⁴⁵ Above, pmb.

economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.⁴⁶

The Charter guarantees civil and political, socio-economic, and even solidarity rights⁴⁷ and imposes absolute and immediate obligations for all categories⁴⁸ of rights that everyone must enjoy without discrimination.⁴⁹ Subsequent Africa's regional human rights treaties have followed the African Charter's template, notably the African Charter on the Rights and Welfare of the Child,⁵⁰ and the Protocol to the African Charter on the Rights of Women in Africa.⁵¹

A corollary to the divisibility argument is the question whether the realisation of socio-economic rights requires any particular form of government or economic system. The myth in the human rights literature is that the Western approach to human rights rests on a near exclusive commitment to civil and political rights; that, “[i]n Western capitalist states economic and social rights are perceived as not within the purview of state responsibility”.⁵² Yet, as Donnelly rightly argues, “it is hard to imagine that anyone

⁴⁶ See African Charter (note 42 above) pmb1.

⁴⁷ See, in general, arts 3 – 24. For analysis, see NJ Udombana ‘Between Promise and Performance: Revisiting States’ Obligations under the African Human Rights Charter’ (2004) 40(1) *Stanford Journal of International Law* 105 112-118.

⁴⁸ See African Charter (note 42 above) art 1.

⁴⁹ Above, art 2.

⁵⁰ Cf African Charter on the Rights and Welfare of the Child adopted 11 July 1990 entry into force 28 Nov 1999 OAU Doc CAB/LEG/TSG/Rev 1 [hereinafter African Child Charter].

⁵¹ Cf Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa adopted 11 July 2003 [hereinafter Women Protocol].

⁵² A Pollis & P Schwab ‘Introduction’ in A Pollis & P Schwab (eds) *Human Rights: Cultural and Ideological Perspectives* (1980) xiii.

looking at the welfare state of Western Europe could make such claims seriously”.⁵³ Within the African milieu, it may be argued that the realisation of socio-economic rights does not require nor preclude any particular form of government or economic system being used as the necessary vehicle, whether democratic or autocratic governments or socialist, capitalist, mixed, centrally planned, or *laissez-faire* economic systems.

In sum, the present writer joins the company of earlier scholars in asserting the indivisibility and inter-relatedness of all human rights. It is futile to split rights, just as it is futile to split life up into politics, economics, humanities, and religion. These things are completely integrated and mutually supporting. Numerous judicial testimonies from diverse jurisdictions fortify this conclusion. In the *Grootboom* case, the South African Constitutional Court observed: “There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter”.⁵⁴ Affording socio-economic rights to all enables them to enjoy civil and political rights as well. Social opportunities of education and health care, says Sen, complement individual opportunities of economic and political participation while also helping to foster individuals’ initiatives in overcoming their respective deprivations.⁵⁵ For De Vos, “[s]tarving people may find it difficult to exercise their freedom of speech while

⁵³ J Donnelly *Universal Human Rights in Theory and Practice* (2nd ed 2003) 111. See also J Donnelly ‘Human Rights, Democracy and Development’ (1999) 21 *Human Rights Quarterly* 608 629-30 (noting the use of the welfare system by all existing liberal democracies to compensate some of “those who fare less well in the market” and that this system “remains a powerful force in all existing liberal democratic regimes and a central source of their legitimacy”).

⁵⁴ See *Government of the Republic of South Africa v Grootboom & Ors* [2000] 11 BCLR 1169 para 23 (CC) [*Grootboom* case]. Cf *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) [hereinafter *Certification* case] (holding that the right of access to adequate housing cannot be viewed in isolation and its close relationship with other socio-economic rights must be taken into account in determining state obligations, together with its social and historical context).

⁵⁵ Sen (note 20 above), xii.

a restriction of freedom of speech may make it difficult for individuals to enforce their right of access to housing”.⁵⁶ These observations are true at all times and in all places.

1.3.2 The Policy or Separation of Powers Argument

Another principal objection to the justiciability of socio-economic rights rests on three separation of power concerns.⁵⁷ Critics claim that socio-economic rights relate to claims to delivery of goods and that they “raise policy decisions about the redistribution of resources [and] fundamental decisions should be made politically rather than judicially”.⁵⁸ Only the legislature and not the judiciary, the argument continues, has the power to make allocations for socio-economic funding⁵⁹ and insisting on their justiciability means that courts must direct the way government distributes state’s resources, a task they are ill suited to perform. Courts, says Ruth Ginsburg, “are accustomed to telling government what it may not do; they are not, by tradition or staffing, well-equipped to map out elaborate programs detailing what the government

⁵⁶ De Vos (note 31 above) 71. See also WT Milner T Wesley & C Steven ‘Security Rights, Subsistence Rights, and Liberties: A Theoretical Survey of the Empirical Landscape’ (1999) 21 *Human Rights Quarterly* 403 413 (underscoring the inextricable link between abuses of personal integrity inherent in not being free from wants and violations of political liberties).

⁵⁷ See MS Kende ‘The South African Constitutional Court’s Embrace of Socio-Economic Rights: A Comparative Perspective’ (2003) 6 *Chapman Law Review* 137 150-54 (for a review of these objections). See, in general, M Tushnet ‘Social Welfare Rights and the Forms of Judicial Review’ (2004) 82 *Texas Law Review* 1895 (reviewing reasons for the judicial non-recognition of social welfare rights).

⁵⁸ Y Ghai ‘An Approach to the Implementation of Economic and Social Rights’ a paper prepared for *Interights Advisory Council Meeting* London 7-9 July 2000 cited in Lord Lester & C O’Cinneide ‘The Effective Protection of Socio-Economic Rights’ in Y Ghai & J Cottrell (eds) *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (2004) 17 18 [hereinafter *Economic, Social & Cultural Rights in Practice*].

⁵⁹ See eg P Monahan *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (1987) 126 (noting the fiscal implications of judicially enforced social welfare rights); and Tushnet *Social Welfare Rights* (note 57 above), 1897.

must do”.⁶⁰ The judiciary is said to be an elite and undemocratically appointed branch of state, thus lacking “the democratic legitimacy necessary to decide the essentially political question of how to divide social resources between factions, groups, and communities in society”.⁶¹

Objections persist even for constitutions that recognize judicially enforceable socio-economic rights, that when courts enforce such rights, they have to get legislatures to raise or divert taxes. Thus, “[t]he conventional wisdom concludes that constitutions with judicially enforceable social welfare rights are even more strongly counter-democratic than those with traditional civil liberties and civil rights”.⁶² Some judicial authorities, particularly in the US, support these claims. In *Dandridge v Williams*,⁶³ the US Supreme Court maintained, “the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients”.⁶⁴ In *Lindsey v Normet*,⁶⁵ the Court confirmed its reluctance to ‘interfere’ in public welfare issues when it held: “Absent constitutional mandate, the assurance of adequate housing and the definition of landlord tenant relationships are legislative, not judicial, functions”.⁶⁶

⁶⁰ RB Ginsburg ‘An Overview of Court Review for Constitutionality in the United States’ (1997) 57 *Louisiana Law Review* 1019 1026.

⁶¹ J de Waal I Currie & G Erasmus *The Bill of Rights Handbook* (2001) 433 (5th ed 2004).

⁶² Tushnet *Social Welfare Rights* (note 57 above), 1897.

⁶³ *Dandridge v Williams* 397 US 471 (1970).

⁶⁴ As above, 487 (stressing that the “problems presented by public welfare assistance programs are not the business of this Court”).

⁶⁵ *Lindsey v Normet* 405 US 56 (1972).

⁶⁶ As above, 74.

The second objection is that the judiciary lacks the competence to make ‘intractable’ decisions that socio-economic rights entail.⁶⁷ In *San Antonio Independent School District v Rodriguez*,⁶⁸ the US Supreme Court stressed that the judiciary does not possess “the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues”,⁶⁹ adding that its “lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels”.⁷⁰ The third objection is the presumption that it is easier for courts to enforce ‘negative’ civil and political rights than ‘positive’ socio-economic rights. Judges, says Tushnet, “may believe that their efforts to direct legislatures to raise substantial revenues are more likely to be systematically disregarded than their efforts to direct legislatures to modify particular laws”.⁷¹

These objections raise a fundamental question about the nature of human rights remedies. The essential question is whether a right to an effective remedy must always involve or require a judicial remedy? The drafting history and adoption of the Human Rights Covenants may have provided the first sets of weapons for the battles on justiciability. Whereas the ICCPR required its States Parties to “develop the possibilities

⁶⁷ See *Dandridge v Williams* (note 63 above) 487. See also DM Davis ‘The Case Against the Inclusion of Socioeconomic Demands in a Bill of Rights Except as Directive Principles’ (1992) 8 *South African Journal of Human Rights* 475.

⁶⁸ *San Antonio Independent School District v Rodriguez* 411 US 1 (1973) (ruling that Texas’ public education financing scheme was consistent with equal protection and substantive due process, despite dramatic school district disparities in per student funding). The Court maintained that the law did not burden either a suspect class nor a fundamental right. Above, 54-55.

⁶⁹ As above, 41.

⁷⁰ As above, 42.

⁷¹ Tushnet *Social Welfare Rights* (note 57 above), 1897 n 10.

of judicial remedy”,⁷² there was no equivalent provision in the ICESCR. *A contrario*, it was suggested—during the drafting of the ICESCR—that complaints “could only refer to insufficient programme in the attainment of certain goals and it would be impossible for the committee to determine what the rate of progress in any particular case should be”.⁷³

The fact is that justiciability itself is “not a legal concept with a fixed content or susceptible of scientific verification”;⁷⁴ it is a variable concept that largely depends on the issue to be adjudicated upon and the constitutional role envisaged for the court.⁷⁵ Three things, in general, are necessary to make a matter justiciable. The first is the nature of the disputes; the second is the interest of the parties to the disputes; and the third is the availability of a remedy.⁷⁶ Otherwise stated, a matter will be regarded as justiceable if it affects a person’s legal rights or relations; or if the person making the allegation is able to show that the violation has injuriously affected his legal rights or relations by the infliction of actual harm or threat of it; or if a judicial remedy is available for the redress of the wrong or violation complained of.⁷⁷ The last requirement—the availability of a remedy—is “perhaps the most difficult element in the concept of justiciability”,⁷⁸ but the answer turns on the nature of judicial power.

⁷² ICCPR (note 25 above) art 2(3)(b).

⁷³ UN Doc A/2929/C3 124 para 41 cited in Craven *The International Covenant on Economic, Social and Cultural Rights* (note 31 above) 101.

⁷⁴ *Poe v Ullman* (1961) 367 US 497 508.

⁷⁵ See Craven *The International Covenant on Economic, Social and Cultural Rights* (note 31 above) 28.

⁷⁶ See BO Nwabueze *Judicialism in Commonwealth Africa* (1977) 15-16.

⁷⁷ Above.

⁷⁸ Above, 16.

A judicial inquiry investigates, declares and enforces rights and liabilities as they stand on present or past facts and under laws supposed already to exist.⁷⁹ Although enforcement is an attribute of judicial power, it is not an essential element of *every* judicial decision. A judicial function may stop short of enforcement. It may simply ascertain and declare existing rights; and “[a] declaration of right is not any less judicial because it is not coupled with a coercive order”.⁸⁰ Human rights, in this view, are not less justiciable because the rights-holder may stop short of obtaining some judicial *awards* for breaches. Sometimes, all that is required is an injunctive relief to prevent some actions (for example, compulsory acquisition of farmlands) that could impinge on human welfare. Socio-economic rights can, at the very minimum, be negatively protected from improper invasion.⁸¹

The right to an effective remedy need not be interpreted as always requiring a judicial remedy.⁸² The ordinary laws of a state are not always in courts and they are not less normative because courts have not made pronouncements on them. Human rights certainly do require implementation and making socio-economic rights justiciable helps to clarify their legal basis and puts their *human-rightness* beyond any reasonable doubt, but their relevance is not necessarily exhausted by litigation.⁸³ Indeed, “to define a right

⁷⁹ See *Prentis v Atlantic Court Line Co* 211 US 210 266.

⁸⁰ N Udombana ‘Concept of Judicial Review’ (1991) 11(2) *Justice* 53 56.

⁸¹ See *Certification* case (note 54 above) para 78. Cf *Grootboom* case (note 54 above) para 34 (where the Constitutional Court read into section 26 of the South African Constitution “a negative obligation placed upon the state and other entities and persons to desist from preventing or impairing the right of access to adequate housing”).

⁸² See ‘The Domestic Application of the Covenant’ Committee on Economic, Social and Cultural Rights (CESCR) General Comment 9 UN Doc E/C12/1998/24 3 Dec 1998 para 9 [hereinafter General Comment 9].

⁸³ See J Cottrell & Y Ghai ‘The Role of the Courts in the Protection of Economic, Social & Cultural Rights’ in *Economic, Social & Cultural Rights in Practice* (note 58 above) 58 60 (noting further: “Human rights have a moral force which can be mobilised even in the absence of judicial enforcement”). As above.

by reference to the ability of the party upon whom the obligation lies—the state—to provide it immediately” or by the existence of a legal course of action to vindicate it is not the test of existence of rights under international law.⁸⁴ If, as An-Na’im persuasively advances, “[t]he essential purpose of human rights is to ensure the effective protection of certain fundamental entitlements for all human beings, everywhere, without distinction on such grounds as race, sex or religion”, then it does not matter if such entitlements are protected through courts or other mechanisms.⁸⁵

The UDHR does not limit the choices open to states for the implementation of the rights it declares. It simply urges states to create whatever social and international orders that are necessary for their protection.⁸⁶ Claims based on socio-economic rights are not incapable of being justiciable merely because they would require courts to dictate to the state how it should allocate scarce resources. While it may be true that courts are ill-equipped to decide such matters, this does not bar consideration of the substantive claim. The question of whether a conventional or constitutional right exists can be addressed without being concerned with whether, or how much of, a state’s expenditure is necessary to secure the right, something that is non-justiciable.⁸⁷

⁸⁴ R Higgins *Problems and Process: International Law and How We Use It* (1994) 99-100 (adding, “to the international lawyer, the existence of a right is tested by reference to the sources of international law”). See also MF Tinta ‘Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’ (2007) 29 *Human Rights Quarterly* 431 434.

⁸⁵ A An-Na’im ‘To Affirm the Full Human Rights Standing of Economic, Social & Cultural Rights’ in *Economic, Social & Cultural Rights in Practice* (note 58 above) 7 8. See also A Eide ‘Future Protection of Economic and Social Rights in Europe’ in A Bloed *et al* (ed) *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms* (1993) 187 214.

⁸⁶ UDHR (note 21 above) art 28.

⁸⁷ Cf *Gosselin v Attorney General of Quebec & Ors* [2002] SCC 84 [Canadian SC] (particularly the dissenting opinion of Arbour J).

It is not even entirely correct to assert that courts are incapable of striking a balance between the goal of social justice and the necessity of management to achieve the effective use of resources, since the two discourses are complementary and interdependent and not antagonistic or even alternative. Deciding on the full operational definition of a right, as the South African Constitutional Court demonstrated in *Soobramoney v Minister of Health, KwaZulu-Natal*,⁸⁸ requires “agonizing choices” to be made about cost efficiency and vexing trade-offs. Such intertwined decisions, according to Steiner, “are vital to the very content and significance of the right”.⁸⁹

1.3.3 *The Vagueness Argument*

The third claim against socio-economic rights is that they are often couched in languages that are too imprecise to be judicially enforceable, compared to their civil and political counterparts.⁹⁰ Vierdag has written that the word “right” in the ICESCR appears to be used in a moral and hortatory sense⁹¹ and that “except in circumstances of minimal or minor economic, social or cultural relevance”, these rights “are of such a nature as to be legally negligible”.⁹² Some commentators further argue that treaties guaranteeing socio-economic rights tend to be drafted more in the form of state obligations rather than of

⁸⁸ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SALR 765 (CC) [hereinafter *Soobramoney* case] (refusing to hold that a seriously ill patient asking the state to provide him with life-saving treatment could rely on the right to life provision in the Bill of Rights).

⁸⁹ HJ Steiner ‘Social Rights and Economic Development: Converging Discourses?’ (1998) 4 *Buffalo Human Rights Law Review* 25 33.

⁹⁰ See RR Churchill & U Khaliq ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’ (2004) 15 *European Journal of International Law* 417 419.

⁹¹ Vierdag (note 18 above) 103.

⁹² As above 105.

rights, whereas those guaranteeing civil and political rights are usually couched in languages that directly establish individual rights.

To illustrate, the ICCPR commits its State Parties “to respect and to ensure to all individuals ... the rights recognized in the present Covenant”.⁹³ Under the ICESCR, each State Party “undertakes to take steps, individually and through international assistance and co-operation ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, including particularly the adoption of legislative measures”.⁹⁴ Such a lack of clarity is said to have normative implications.⁹⁵ The key argument, according to McGoldrick, was that, “whatever the merits of the debate as to the primacy of the categories of rights, the nature of the general obligation to implement was different and the two categories called for different implementation systems”.⁹⁶

The ICESCR was not the first treaty to adopt a progressive realisation clause; some of the earliest conventions of the International Labour Organisation (ILO) adopted the “means test” to cater for the low level of development in some less industrialised countries. The Convention on Social Security (Minimum Standards)⁹⁷ allowed a state, in

⁹³ ICCPR (note 25 above) art 2(1).

⁹⁴ ICESCR (note 26 above) art 2(1). Some constitutional guarantees are similarly worded. The Constitution of South Africa 1996 urges the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to adequate housing. Constitution of South Africa 1996 sec 26(2). Cf sec 27(1)–(2) (declaring that the state must take “reasonable . . . measures, within its available resources” to provide everyone with healthcare services).

⁹⁵ See P Alston ‘No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant’ in A Eide & J Helgesen (eds) *The Future of Human Rights Protection in a Challenging World: Fifty Years Since the Four Freedoms Address: Essays in Honour of Torkel Opsahl* (1991) 79 86 (mentioning articles 6 to 9 of the ICESCR as notable exceptions).

⁹⁶ D McGoldrick ‘The United Nations Convention on the Rights of the Child’ in M Freeman (ed) *Children’s Rights* (vol II 2004) 79 80.

⁹⁷ The Convention on Social Security (Minimum Standards) (No 102) of 1952 [hereinafter Convention 102].

the case of insufficient financial or medical capacity, to ratify the Convention and avail itself of temporarily less stringent conditions concerning the duration of benefits and categories of protected persons.⁹⁸ A comparison of the European Convention of Human Rights (ECHR)⁹⁹ and the European Social Charter (ESC)¹⁰⁰ also reveals verbal differences. The ECHR, which guarantees essentially civil and political rights, provides: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.”¹⁰¹ The ESC, which deals with socio-economic rights, provides: “With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake: (1) to establish the effective exercise of the right to social security”.¹⁰²

The vagueness problem, says critics, is compounded by the weak institutions usually established to implement socio-economic rights, compared to their civil and political counterparts, which usually provide for a system of individual complaints. Periodic reports are the most often used mechanisms for international supervision of socio-economic rights. The ICESCR provides: “The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures

⁹⁸ Above, art 3.

⁹⁹ See eg European Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature 4 Nov 1950 ETS No 5 213 UNTS 221 *as amended* by Protocol No 11 (entry into force 1 Nov 1998) ETS No 155 (1994) 33 *International Legal Material* 960 [hereinafter European Convention or ECHR].

¹⁰⁰ See eg European Social Charter adopted 18 Oct 1961 entry into force on 26 Feb 1965 (1965) UKTS 38 Cmnd 2643; 529 UNTS 89-139; 35 ETS [hereinafter ESC].

¹⁰¹ ECHR (note 99 above) art 5.

¹⁰² ESC (note 100 above) art 12.

which they have adopted and the progress made in achieving the observance of the rights recognized herein”.¹⁰³ To say that a right is “enforceable”, says Vierdag,

mean[s] that an authority of the state (or, for that matter, an international authority) is competent to receive complaints about violations of the right by anyone—executive state organ, official or private person—and to give redress by cancelling or rectifying the violating act or regulation, or by awarding compensation for damage, or both. If the authority in question is a court of law, the term ‘justiciable’ may be preferred.¹⁰⁴

These claims are valid partial truths, but false total truths. They beg the question whether the international community can treat certain treaties as law while rejecting others, though the all passed the treaty-making criteria and were duly executed by states parties. Assuming, without conceding, the vagueness argument, it remains “the essence of the judicial craft” to give “some precise, principled content” to “even the most vague and general text”.¹⁰⁵ In any event, many civil and political rights are not necessarily more precise in their nature. The actual meaning of torture has achieved precision not through its legal prohibition, but through the judicial construction of relevant treaty and constitutional provisions.¹⁰⁶ The same holds for other civil and political rights.

¹⁰³ ICESCR (note 26 above) art 16(1). Procedurally, such reports are submitted to the UN Secretary-General, who transmits copies to the Economic and Social Council (ECOSOC) for consideration, in accordance with the provisions of the Covenant. As above, art 16(2)(a).

¹⁰⁴ Vierdag (note 18 above) 73.

¹⁰⁵ A Scalia ‘The Rule of Law as the Law of Rules’ (1989) *University of Chicago Law Review* 1175 1183.

¹⁰⁶ See Tinta (note 84 above) 434 (arguing that by depriving judicial enforcement mechanisms to treaties on socio-economic rights, states, in fact, have deprived precision to these rights and prevent the development of the content of obligations and the judicial means to vindicate them). As above.

It is not even true that the language of socio-economic rights is vague in all treaties. The socio-economic rights provisions in the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)¹⁰⁷ are couched in precise language. As an example, the Convention provides:

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.¹⁰⁸

All rights in the African Charter are worded in precise language, such as, “Every individual shall have the right to enjoy the best attainable state of physical and mental health”;¹⁰⁹ or, “Every individual shall have the right to education”.¹¹⁰

Second, there is nothing inherent in socio-economic rights preventing judicial determination of their contents. The ‘1503 Procedure’, established by the CHR,¹¹¹ does not make any distinction as to the categorisation of rights in question. Some right-specific

¹⁰⁷ Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res 45/158 18 Dec 1990 (not yet in force).

¹⁰⁸ Above, art 28.

¹⁰⁹ African Charter (note 42 above) art 16(1).

¹¹⁰ Above, art 17.

¹¹¹ The 1503 procedure, called after the resolution of the Economic and Social Council (ECOSOC) that established it [ECOSOC Res 1503 (XLVII) of 27 May 1970], is the oldest human rights complaint mechanism in the UN system. Under this procedure the CHR, a political body composed of State representatives, generally deals with situations in countries rather than individual complaints. The procedure was substantially amended in 2000 by the ECOSOC to make it more efficient, to facilitate dialogue with governments concerned and to provide for a more meaningful debate in the final stages of a complaint before the CHR.

treaties also cover a broad spectrum of different rights and impose absolute and immediate obligations for all categories of rights that they guarantee and make allowances for the means available to states to fulfil them. Among these are the International Convention on the Elimination of All Forms of Racial Discrimination,¹¹² Convention on the Elimination of All Forms of Discrimination Against Women,¹¹³ the African Child Charter and the Women Protocol. The Race Convention, which establishes the right of individual petition,¹¹⁴ does not distinguish between the different types of rights protected by its Article 5.

The rights-oriented character of the ICESCR is evident right from its preamble, which declares that socio-economic rights are based on the inherent dignity of all human beings, and respond to the ideal that all human beings may be free “from fear and want”. The Committee on Economic, Social and Cultural Rights (CESCR) cites certain provisions of the ICESCR that are capable of immediate implementation,¹¹⁵ such as those relating to equality;¹¹⁶ fair wages and equal remuneration for work of equal value;¹¹⁷ the right to unionise, including the organic right to strike;¹¹⁸ and special measures of

¹¹² International Convention on the Elimination of All Forms of Racial Discrimination opened for signature 7 Mar 1966 entry into force 4 Jan 1969 660 UNTS 195 [hereinafter Race Convention].

¹¹³ Convention on the Elimination of All Forms of Discrimination Against Women opened for signature 1 Mar 1980 27 UST 1909 TIAS No 8289 1249 UNTS 14 [hereinafter CEDAW].

¹¹⁴ See Race Convention (note 112 above) art 14.

¹¹⁵ See CESCR General Comment 3 ‘The Nature of State Parties’ Obligations (art 2(1) para 1 of the Covenant)’ (5th session 1990) UN Doc E/1991/23 Annex III para 5. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, though a soft-law, also establishes a list of violations of socio-economic rights with a view to facilitating an adjudicative exercise. ‘The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 *Human Rights Quarterly* 691 693–94 [hereinafter Maastricht Guidelines].

¹¹⁶ See ICESCR (note 26 above) art 3.

¹¹⁷ Above, art 7(a)(i).

¹¹⁸ Above, art 8.

protection and assistance to children.¹¹⁹ Others are provisions relating to primary education, liberty of parents to choose their children's schools, and liberty to establish educational institutions;¹²⁰ and freedom to undertake scientific research and creative activity.¹²¹ The CESCRC envisages the use of judicially determined local remedies for violations of ICESCR and insists on recognising ICESCR norms in appropriate ways within their domestic legal order.

The African Commission on Human and Peoples' Rights has also shown that the protection of socio-economic rights is possible; in any event, the African Charter affords such protection. The *Social & Economic Rights Action Centre v Nigeria*¹²² is emblematic of the emergent international case law on socio-economic rights in Africa. There, the Commission held that "collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa ... [and that] *there is no right in the African Charter that cannot be made effective*".¹²³ As the present writer remarked, "*SERAC* and its progeny will have great significance in the development of human rights jurisprudence in Africa, as these decisions have the ability to positively affect domestic courts' interpretation and application of [socio-economic] rights".¹²⁴

¹¹⁹ Above, art 10(3).

¹²⁰ Above, art 13(2)(a) (3) & (4).

¹²¹ Above, art 15(3).

¹²² See *Social & Economic Rights Action Center & Anor v Nigeria* Comm No 155/96 2001–2002 African Annual Activity Report Annex V [hereinafter *SERAC* case].

¹²³ Above, para 68 (italics supplied).

¹²⁴ Udombana 'Between Promise and Performance' (note 47 above) 130.

The Additional Protocol to the European Social Charter, which provides for a System of Collective Complaints,¹²⁵ recognises the rights of relevant international employers, labour unions, and international NGOs to submit complaints before the Committee of Independent Experts alleging unsatisfactory application of the Charter.¹²⁶ Similarly, the 1988 San Salvador Protocol to the American Convention on Human Rights¹²⁷ allows a right to individual petition on rights to education and to organise.¹²⁸ The Protocol was the subject of an advisory opinion by the Inter-American Court of Human Rights of 17 September 2003¹²⁹ challenging receiving-country governments to justify the curtailment of employment and labour rights for unauthorised migrant workers. The Court concluded that employment and labour rights must extend to all workers equally, regardless of their immigration status. This conclusion, according to Beth Lyon, “represents a significant expansion of labour and employment rights for unauthorized workers within the international legal community”.¹³⁰

As this thesis will illustrate in subsequent chapters, municipal jurisprudence clearly indicates that socio-economic rights are capable of judicial enforcement. The Indian and

¹²⁵ See Additional Protocol to the European Social Charter Providing for a System of Collective Complaints concluded 9 Nov 1995 entry into force 1 July 1998 ETS no 158 [hereinafter Addition Protocol to the ESC].

¹²⁶ See above, art 1.

¹²⁷ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 1988 (1988) OAS Treaty Series 69 (setting forth numerous labour, employment-related, and economic rights).

¹²⁸ Above, art 19(6).

¹²⁹ See Advisory Opinion OC-18/03 Legal Status and Rights of Undocumented Migrants Inter-Am Ct HR (17 Sept 17 2003) [hereinafter OC-18]. Mexico requested the advisory opinion, in response to a US Supreme Court decision that severely curtailed the labour law remedies available to unauthorised workers in the United States. See *Hoffman Plastic Compounds Inc v NLRB* 535 US 137 (2002) (involving an unauthorised Mexican worker who was fired after supporting a union organising campaign).

¹³⁰ B Lyon ‘The Inter-American Court of Human Rights Defines Unauthorised Migrant Workers’ Rights for the Hemisphere: A Comment on Advisory Opinion 18 (2004) 28 *New York University Review of Law and Social Change* 547 548.

South African courts have interpreted obligations in their constitutions and given remedies in ways that are both creative and inspiring. With the proposed adoption of the Optional Protocol to the ICESCR, advocates of non-justiciability of socio-economic rights will soon be preaching to the choir.¹³¹ The proposal, which has reached an advanced stage of elaboration, is based largely on the first Optional Protocol to the ICCPR¹³² and other communication procedures under existing UN human rights system. It empowers the CESCR to receive and consider individual complaints. Although debates about the desirability of such a complaint mechanism had been in the air for some years,¹³³ the CESCR began studying the question of an optional protocol in 1990 and submitted a draft proposal for the CHR's consideration in 1996.¹³⁴ When the Optional Protocol is adopted, ratified and becomes international law, then decisions of the CESCR should constitute authoritative interpretations of the legally binding obligations of States Parties to the ICESCR, like its ICCPR counterpart. This means that violations of the ICESCR will attract liabilities and remedies, including the award of compensations.¹³⁵

¹³¹ The decision to establish the Working Group was made pursuant to the Commission on Human Rights (CHR) Res 2002/24 (Apr 22) para 9(f). For the subsequent ratification by the Economic and Social Council (ECOSOC), see ECOSOC Dec 2002/254 (July 25).

¹³² Optional Protocol to the ICCPR adopted 16 Dec 1966 999 UNTS 171.

¹³³ Proponents of a strong enforcement complaint mechanism argue that its absence in the ICESCR has marginalised socio-economic rights and stymied their full realisation. See M Dennis & D Stewart 'Justiciability of Economic, Social and Cultural Rights: Should There be an International Complaint Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?' (2004) 98(3) *American Journal of International Law* 462 463. See, in general, K Arambulo *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (1999); F Coomans & F van Hoof (eds) *The Right to Complain about Economic, Social and Cultural Rights* (1995); M Nowak 'The Need for an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (1995) *Review of the International Commission of Jurists* 153; K Tomasevski 'Justiciability of Economic, Social and Cultural Rights' (1995) *Review of the International Commission of Jurists* 203; Alston 'No Right to Complain About Being Poor' (note 95 above) 79; and P Alston 'Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 332.

¹³⁴ See UN Doc E/CN4/1997/105 annex (1996).

¹³⁵ Dennis & Stewart (note 133 above) 468.

In summary, “the possibility and role of judicial enforcement should be assessed and developed in relation to each human right, instead of denying it to some purported class of rights because they do not fit the model of judicial enforcement of certain civil and political rights”.¹³⁶

1.3.4 The Cost Argument

A final argument against socio-economic rights is that they are too expensive to implement, as they depend on ‘costly’ programmes of positive state action, compared to civil and political rights that require only negative action from the state—a “hands off” obligation. Vierdag asserts that because socio-economic rights are resource-intensive, their implementation should properly be a matter of politics rather than of law or rights.¹³⁷ Some scholars on the African human rights system are strangely more strident in making this claim. Rembe argues that socio-economic rights are neither implementable nor enforceable in Africa, because of “the limitations and constraints of the African States”.¹³⁸ For Gittleman, the realities of African economic development render socio-

¹³⁶ An-Na'im (note 85 above) 7.

¹³⁷ Vierdag (note 18 above) 103.

¹³⁸ NS Rembe *The System of Protection of Human Rights Under the African Charter on Human and Peoples' Rights: Problems and Prospects* (Lesotho 1991) 12.

economic rights merely “promotional and not protective”.¹³⁹ Umozurike also maintains that African states cannot guarantee a right to work.¹⁴⁰

Studies show a linkage between economic development and the fulfilment of basic human needs;¹⁴¹ and the lack of resources or underdevelopment could truly hinder the fulfilment of socio-economic rights, but a failure to implement treaty or constitutional obligations does not derogate from their normativity.¹⁴² Even states that hoist the normative flag of civil and political rights cannot lay claim to a good conscience in terms of their implementation. A country’s prosperity and economic development is not necessarily a guarantee that its government will satisfy the basic needs of its citizens.¹⁴³

The decision to put two sets of rights in different treaties—ICCPR and ICESCR—and to establish different supervisory mechanisms were well considered at that time and the underlying reasons for those distinctions appear to remain valid even today. However, as Dennis and Stewart argue, “[t]heir treatment in no way disqualified economic, social, and cultural rights as rights or relegated them to a lower hierarchical rung. It did reflect an assessment of the practical difficulties that states would face in implementing

¹³⁹ R Gittleman ‘The African Charter on Human and Peoples’ Rights: A Legal Analysis’ (1982) 22 *Virginia Journal of International Law* 667 687. Cf RM D’sa ‘The African Charter on Human and Peoples’ Rights: Problems and Prospects for Regional Action’ (1987) 10 *Australian Yearbook of International Law* 101 114 (contending that under-development and acute economic crises of African states are the reasons behind the non-enforcement of socio-economic rights). See also M Haile ‘Human Rights in Africa: Observations on the Implication of Economic Priority’ (1986) 19 *Vanderbilt Journal of Transnational Law* 299 300-01.

¹⁴⁰ See UO Umozurike ‘The Significance of the African Charter on Human and Peoples’ Rights’ in AU Kalu & Y Osinbajo (eds) *Perspectives on Human Rights* (1992) 44 48.

¹⁴¹ See eg HS Park ‘Correlates of Human Rights: Global Tendencies’ (1987) 9 *Human Rights Quarterly* 405 410-13 (revealing that economic development is the strongest predictor of improved basic needs achievement). See also BE Moon & WJ Dixon ‘Politics, the State, and Basic Human Needs: A Cross National Study’ (1985) 29 *American Journal of Political Science* 661 689-90.

¹⁴² A Gewirth *The Community of Rights* (1996) 5.

¹⁴³ See N Chomsky ‘The United States and the Challenge of Relativity’ in T Evans (ed) *Human Rights Fifty Years on: A Reappraisal* (1998) 24 33-40.

generalized norms requiring substantial time and resources”.¹⁴⁴ An element of all rights, whether civil and political or socio-economic, is an entitlement to governmental action and the qualified and progressive obligations under such treaties as the ICESCR “are still binding obligations in international law”.¹⁴⁵

Obviously, socio-economic rights point mostly towards positive state actions for their realisation¹⁴⁶ and giving effect to them often involve some complexities. The CESCR holds that the following presumptions and entitlements constitute the right to housing: (a) measures that give security of tenure in its variety of forms to those lacking protection; (b) policies that ensure that the percentage of housing-related costs is, in general, commensurate with income levels; (c) policies ensuring availability of building materials; (d) protection against unreasonable rent levels or rent increases; (e) adoption of measures against forced evictions; (f) provision of sustainable access to natural and common resources, safe drinking water, energy, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.¹⁴⁷ It is easy to understand why even rich and capitalist countries object to the implementation of socio-economic rights!¹⁴⁸

¹⁴⁴ Dennis & Stewart (note 133 above) 465.

¹⁴⁵ P Sieghart *The International Law of Human Rights* (1983) 62.

¹⁴⁶ See, in general, P Alston & G Quinn ‘The Nature and Scope of State Parties’ Obligations Under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156.

¹⁴⁷ See CESCR General Comment No 4 1999 para 8.

¹⁴⁸ See Cottrell & Ghai (note 83 above) 63.

The truth is that all rights have costs and a state without funds cannot protect rights.¹⁴⁹ All rights require both negative and positive actions at different levels and “the expenditure of collective resources is required to protect both negative and positive rights”.¹⁵⁰ Of course, socio-economic rights will almost inevitably give rise to more budgetary implications, but this fact alone should not bar their justiciability.¹⁵¹ Conversely, some socio-economic rights require only negative state action, for example the right not to be evicted from one’s home. States, according to Sieghart, also “require no costly programmes in order to comply with their obligations to ensure ‘equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence’”.¹⁵²

Civil and political rights, on the other hand, have demonstrably been shown to demand positive state action and interference for their realization—*le droit a la resistance et a la defense*, as opposed to *le droit a l’obtention et a l’exigence*; indeed, some civil and political rights require only positive state action.¹⁵³ The ICCPR contains an affirmative undertaking by States “to respect and to ensure ... the rights [so] recognized”;¹⁵⁴ and “[t]he obligation to respect and ensure, even with regard to the traditional “liberal” rights, can give rise to affirmative state obligations to intervene in

¹⁴⁹ See S Holmes & CR Sunstein *The Cost of Rights: Why Liberty Depends on Taxes* (1998) (explaining, for example, that “[u]nder the First Amendment’s protection of free speech, states must keep streets and parks open for expressive activity, even though it is expensive to do this, and to do it requires an affirmative act”). As above, 52.

¹⁵⁰ R Hirschl “Negative” Rights vs. “Positive” Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order” (2000) 22 *Human Rights Quarterly* 1060 1073.

¹⁵¹ Cf *Certification* case (note 54 above) para 78.

¹⁵² Sieghart (note 145 above), 125.

¹⁵³ See eg I Hare ‘Social Rights as Fundamental Human Rights’ in B Hepple (ed) *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (2002) 159 (illustrating how rights other than socio-economic rights may impose positive obligations on the state).

order to see that the rights are realized”.¹⁵⁵ Primarily, such affirmative obligations have been limited to inhuman treatment and health conditions in prisons under Articles 7 and 10 of the ICCPR. Among the positive obligations engendered by those two articles include the duty to train appropriate personnel: enforcement personnel, medical personnel, police officers, any “any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention, or imprisonment”.¹⁵⁶

There is also no sound reason to exclude life, dignity, non-discrimination, equality before the law, and fair trial from the list of “cross-cutting rights”.¹⁵⁷ The right to life might entail one receiving life-saving medical treatment at state expense. In commenting on the right to life in the ICCPR, the Human Rights Committee (HRC) stated:

The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.¹⁵⁸

¹⁵⁴ ICCPR (note 25 above) art 2.

¹⁵⁵ PG Carozza ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97(1) *American Journal of International Law* 38 48.

¹⁵⁶ Human Rights Committee General Comment No 20 (Concerning Prohibition of Torture and Cruel Treatment or Punishment (art 7) (1992) para 10 [hereinafter General Comment No 20]. A similar obligation is engendered under the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment 10 Dec 1984 art 10 1465 UNTS 85 [hereinafter Torture Convention].

¹⁵⁷ For a brief discussion on “cross-cutting rights” in the African Charter, see CA Odinkalu ‘Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples’ Rights’ (2001) 23 *Human Rights Quarterly* 327 337–39.

¹⁵⁸ Human Rights Committee Report at 93 UN GAOR 37th Sess Supp No 40 UN Doc A/37/40 (1982).

Sieghart similarly argues that—

liberty and security, arrest and detention, the rights of accused persons and the provision of fair trials all require substantial expenditure by the State in training and maintaining competent police forces, a responsible public prosecution service, and a competent, independent, and impartial judiciary – as well as providing, where necessary, free legal assistance and court interpreters.¹⁵⁹

There are other examples of costly ‘negative’ rights. The enforcement and preservation of property rights—a classic negative right—requires a detailed registration and protection apparatus, which the state has traditionally sponsored. The right to free speech or expression is generally regarded as immunity against intrusion, but it includes “an obligation to create conditions favourable to the freedom to demonstrate (police-escort, police-protection, etc.) and to pluralism in the press and media in general”.¹⁶⁰ This right can be enforced only if there is a judicial system in place that is capable and willing to protect it against state and private intrusions. A state that fails to adequately fund its judiciary in order to provide effective remedy to complainants violates rights, just as if the state tortures its citizens.¹⁶¹

¹⁵⁹ Sieghart (note 145 above), 125.

¹⁶⁰ GJH van Hoof ‘The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views’ in P Alston & K Tomassevski (eds) *The Right to Food* (1984) 97 107.

¹⁶¹ Cf Sieghart (note 145 above) 126.

The European Court of Human Rights has also developed affirmative obligations on civil and political rights, with an extensive jurisprudence covering the right to life, the right to respect for family and private life, and the right to a fair trial.¹⁶² At the municipal level, the South African Constitutional Court has found positive obligations with respect to civil and political rights. In the *Certification* case, the Court observed that “many of the civil and political rights entrenched in the NT [new draft Constitution] will give rise to similar budgetary implications without compromising their justiciability”.¹⁶³ In *August v Electoral Commission*,¹⁶⁴ the Court held that “the right to vote by its very nature imposes positive obligations upon the legislature and the executive”.¹⁶⁵ The exercise of this right demands the state to provide for electoral offices and officers, construct polling-booths, conduct voters’ registration exercises, and print election materials, including voter’s cards. All this, of course, involves huge costs.

The Canadian Supreme Court has also exposed the superficiality of the negative/positive obligation. According to Arbour J:

As a theory of the Charter as a whole, any claim that only negative rights are constitutionally recognised is of course patently defective. The rights to vote (section 3), to trial within a reasonable time (s 11(b)), to be presumed innocent (s 11(d)), to trial by jury in certain cases (s 11(f)), to an interpreter in penal proceedings (s 14),

¹⁶² See, in general, P van Dijk “Positive Obligations” Implied in the European Convention on Human Rights: Are the States Still “Masters” of the Convention?” in M Castermans-Holleman *et al* (eds) *The Role of the Nation-State in the 21st Century* (1998) 17.

¹⁶³ *Certification* case (note 54 above) para 78.

¹⁶⁴ *August v Electoral Commission*, 1999 (3) SA 1 (CC).

¹⁶⁵ Above, para 16.

and minority language education rights (s 23) to name but some, all impose positive obligations of performance on the state and are therefore best viewed as positive rights (at least in part).¹⁶⁶

The cost argument misses a vital point, which is that human rights do not always require price tags. All rights, by definition, are both inherent and instrumental goods;¹⁶⁷ they play (which is the same thing, in other words) “constitutive” and “instrumental” roles. The constitutive role of freedom “relates to the importance of substantive freedom in enriching human life”.¹⁶⁸ The instrumental role deals with the way different kinds of rights, be they civil and political or socio-economic, contribute to the expansion of human freedom in general and, thus, promote development.¹⁶⁹ The right to free speech is an inherent good and a means of enriching the marketplace of ideas and, hence, cultural and political processes.¹⁷⁰ “The effectiveness of freedom as an instrument”, according to Sen, “lies in the fact that different kinds of freedom interrelate with one another, and freedom of one type may greatly help in advancing freedom of other types. The two roles

¹⁶⁶ *Gosselin v Quebec (Attorney General)* (2002-12-19) SCC (referencing *Dunmore v Ontario (Attorney General)* [2001] 3 SCR 1016; [2001] SCC 94), where the Court also found that the state has a positive obligation in certain cases to ensure that its labour legislation is properly inclusive, thus finding a positive dimension to the s 2(d) right to associate).

¹⁶⁷ See Steiner (note 89 above) 30 (stressing that this dual character of freedoms informs many parts of the human rights framework, including civil and political rights).

¹⁶⁸ See Sen (note 20 above) 36 (listing, as examples of substantive freedom, “elementary capabilities like being able to avoid such deprivations as starvation, undernourishment, escapable morbidity and premature mortality, as well as the freedoms that are associated with being literate and numerate, enjoying political participation and uncensored speech and so on”).

¹⁶⁹ Above, 37.

¹⁷⁰ See Steiner (note 89 above) 30.

are thus linked by empirical connections, relating freedom of one kind to freedom of other kinds”.¹⁷¹

1.3 Developments in Africa

Treaty and constitutional guarantees of socio-economic rights in Africa fortify the normativity of these rights. This segment examines these developments while reflecting on the yawning gap between vision and reality.

1.4.1 Treaty and Constitutional Guarantees

African states have made formal commitments to numerous human rights instruments both at the global and regional levels, some of which guarantee socio-economic rights. About 46 African states are parties to the ICESCR,¹⁷² representing 30.8 percent of 149 States Parties world-wide¹⁷³ but 86.7 percent of the 53 Member States of the African Union (AU). Many African states are parties to the African Child Charter and the Women Protocol,¹⁷⁴ but the African Charter remains the most significant human rights treaty in the Continent, in terms of its formal commitments by states.¹⁷⁵ Many countries have also incorporated the Charter (including its socio-economic guarantees) into their

¹⁷¹ Sen (note 20 above) 37.

¹⁷² For ratification status of universal human rights treaties, see *Status of Ratifications of the Principal International Human Rights Treaties* available at <www.unhchr.ch/pdf/report.pdf> [hereinafter *Status of Ratifications*]. Three African states—Liberia, Sao Tome and Principe, and South Africa—have signed the ICESCR but have not yet ratified. Six African countries—Botswana, Comoros, Mauritania, Mozambique, and United Arab Emirates—have neither signed nor ratified. See above.

¹⁷³ See above.

¹⁷⁴ For status of ratifications of all regional human rights instruments in Africa, see AU website.

¹⁷⁵ All African countries are parties to the Charter, except Morocco.

constitutions; others have transformed the Charter into their municipal laws through domestic legislation.

The African Charter reflects “Africa’s cultural fingerprint”,¹⁷⁶ by balancing the interest of the individual with that of the community and enshrining both rights and duties.¹⁷⁷ Nguema describes the Charter as—

one of the finest gems, designed by Africa with a view to endowing itself with proper self-awareness, creating a new image in the chain of peoples of the world, giving itself a place of choice in the concert of nations, and playing, henceforward, a significant role in the management and conduct of the world’s affairs.¹⁷⁸

Five of the Charter’s articles are devoted to typical socio-economic rights, which must be enjoyed by every individual “without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”.¹⁷⁹ The Charter guarantees the right to property, which may only be encroached upon in the interest of public need or in the general interest of the community;¹⁸⁰ the “right to work under equitable and satisfactory

¹⁷⁶ M Mutua ‘The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties’ (1995) 35 *Virginia Journal of International Law* 339.

¹⁷⁷ On duties, see African Charter (note 42 above) arts 27 – 29.

¹⁷⁸ I Nguema ‘Africa, Human Rights and Development’ (1998) 7 *Review of the African Commission on Human and Peoples’ Rights* 91.

¹⁷⁹ African Charter (note 42 above) art 2.

¹⁸⁰ Above, art 14.

conditions”;¹⁸¹ and “the right to enjoy the best attainable state of physical and mental health”.¹⁸² Others are the right to education, including the individual’s participation in cultural life;¹⁸³ and the protection of the family, regarded as “the natural unit and basis of society”.¹⁸⁴ The Charter holds states to their minimum core obligations in relation to these rights.¹⁸⁵

The Charter conspicuously omits such vital socio-economic rights as housing. Some attributes the omission to “an endeavour not to guarantee rights which have no chance of being realized.”¹⁸⁶ A more plausible explanation might be the bad faith of then authoritarian rulers in Africa,¹⁸⁷ who were more interested in politics of patronage and social fragmentation than in the equitable distribution of national wealth. However, in the *SERAC* case, the African Commission found a right to housing through an integrative interpretation of the Charter. It inferred a right to shelter or housing from the combined effect of the right to enjoy the “best attainable state of mental and physical health”, the right to property, and the protection accorded to families, which forbids the destruction of property.¹⁸⁸

¹⁸¹ Above, art 15.

¹⁸² Above, art 16.

¹⁸³ Above, art 17.

¹⁸⁴ Above, art 18.

¹⁸⁵ For a discussion of the nature of these obligations, see Chapter two.

¹⁸⁶ P Kunig ‘Regional Protection of Human Rights: A Comparative Introduction’ in P Kunig *et al* (eds) *Regional Protection of Human Rights by International Law: The Emerging African System* (1985) 45.

¹⁸⁷ See E Brems *Human Rights: Universality and Diversity* (2001) 127.

¹⁸⁸ *SERAC* case (note 122 above) para. 60.

In 2000, African leaders adopted the Constitutive Act of the AU¹⁸⁹ “to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world”.¹⁹⁰ The AU Act is revolutionary in a number of respects, in particular its emphasis on economic development and human rights. The Act promises to promote and protect human and peoples’ rights in accordance with the African Charter and other relevant human rights instruments,¹⁹¹ which obviously includes the ICESCR. It promises to “[p]romote cooperation in all fields of human activity to raise the living standards of African peoples”¹⁹² and to “[w]ork with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent”.¹⁹³ Like with the Africa Charter, all African States are parties to the AU Act, with the exception of Morocco.

Furthermore, most national constitutions in Africa contain generous provisions on socio-economic rights.¹⁹⁴ All but four constitutions—DR Congo, Guinea-Bissau, Somalia, and Swaziland—guarantee the right to property.¹⁹⁵ Several others guarantee the

¹⁸⁹ Constitutive Act of the African Union (AU) adopted 11 July 2000 entry into force 26 May 2001 CAB/LEG/23.15 (as amended by the Protocol on Amendments to the Constitutive Act of the African Union 11 July 11 2003) [hereinafter AU Act].

¹⁹⁰ Above, pmbl.

¹⁹¹ Above, art 3(h).

¹⁹² Above, art 3(k).

¹⁹³ Above, art 3(n).

¹⁹⁴ This overview is based on constitutional extracts in C Heyns (ed) 2 *Human Rights Law in Africa* (2004).

¹⁹⁵ These are, alphabetically, Algeria (sec 52), Angola (sec 10), Benin (sec 22), Botswana (sec 8), Burkina Faso (sec 15), Burundi (sec 36), Cameroon (prmb), Cape Verde (sec 68), Central African Republic (sec 14), Chad (sec 17&41), Comoros (pmbl), Congo (sec 17), Cote d’Ivoire (sec 15), Djibouti (sec 12), Egypt (sec 32&34), Equatorial Guinea (sec 27(d)&29), Eritrea (sec 23), Ethiopia (sec 40), Gabon (sec 1(10)), Gambia (sec 22), Ghana (sec 18,20&36), Guinea (sec 13), Kenya (sec 70&75), Lesotho (sec 4&17), Liberia (sec 11&22), Libya (sec 7&8), Madagascar (sec 34), Malawi (sec 28), Mali (sec 13), Mauritania (sec 15), Mauritius (sec 3&8), Morocco (sec 15), Mozambique (sec 86), Namibia (sec 16), Niger (sec 21),

rights to education,¹⁹⁶ to work,¹⁹⁷ to social security,¹⁹⁸ to health,¹⁹⁹ to housing,²⁰⁰ and to food.²⁰¹ Some constitutional guarantees are amenable to adjudication; others are not (at least in principle), but are regarded as “directive principles of state policy”. The South African Constitution requires the state “to respect, protect, promote and fulfil the rights in the Bill of Rights”²⁰² and empowers the Court to grant appropriate relief for the

Nigeria (sec 43&44), Rwanda (sec 23), Sao Tome & Principe (sec 46), Senegal (sec 8&15), Seychelles (sec 26), Sierra Leone (sec 15&21), South Africa (sec 25), Sudan (sec 28), Tanzania (sec 24), Togo (sec 27), Tunisia (sec 14), Uganda (sec 26&237), Zambia (sec 11,16&17), and Zimbabwe (sec 16).

¹⁹⁶ These are, alphabetically, Algeria (sec 53), Angola (sec 28(2)&49), Benin (sec 12), Burkina Faso (sec 18&27), Burundi (sec 34&44), Cameroon (pmb), Cape Verde (sec 49&77), Central African Republic (sec 6&7), Chad (sec 35), Comoros (pmb), Congo (sec 23), Cote d’Ivoire (sec 7), Egypt (sec 18,19&20), Equatorial Guinea (sec 23), Eritrea (sec 21), Ethiopia (sec 41&90), Gabon (sec 1(16)), Gambia (sec 30&217), Ghana (sec 25&38), Guinea (sec 21), Lesotho (sec 28), Liberia (sec 6), Libya (sec 14), Madagascar (sec 23&24), Malawi (sec 13&25), Mali (sec 17), Mozambique (sec 52&92), Namibia (sec 20), Niger (sec 11&19), Nigeria (sec 18), Rwanda (sec 26), Sao Tome & Principe (sec 30&54), Senegal (sec 22), Seychelles (sec 33), Sierra Leone (sec 9), South Africa (sec 29), Sudan (sec 12,14&28), Tanzania (sec 11), Togo (sec 35), and Uganda (sec 30).

¹⁹⁷ These are, alphabetically, Algeria (sec 55), Angola (sec 46(1)), Benin (sec 30), Burkina Faso (sec 18&19), Burundi (sec 45), Cape Verde (sec 60), Central African Republic (sec 9), Chad (sec 32), Congo (sec 24), Cote d’Ivoire (sec 16&17), Djibouti (sec 15), Egypt (sec 13&15), Equatorial Guinea (sec 25), Ethiopia (sec 41(2)), Gabon (sec 1(7)), Ghana (sec 24,34(2)&36), Guinea (sec 18), Guinea Bissau (sec 46), Lesotho (sec 29(1)), Liberia (sec 18), Libya (sec 4), Madagascar (sec 27), Malawi (sec 24&29), Mali (sec 19), Mauritania (sec 12), Morocco (sec 13), Mozambique (sec 88(1)), Namibia (sec 21(1)(i)), Niger (sec 25&30), Nigeria (sec 17(3)(a-e)), Rwanda (sec 30), Sao Tome & Principe (sec 41), Senegal (sec 8&25), Seychelles (sec 35), Sierra Leone (sec 7&8), South Africa (sec 22), Swaziland (sec 23), Tanzania (sec 11,22&23), Togo (sec 37), and Uganda (sec 14(b)&40).

¹⁹⁸ These are, alphabetically, Algeria (sec 59), Angola (sec 47&48), Benin (sec 26), Burkina Faso (sec 18), Cameroon (pmb), Cape Verde (sec 69), Chad (sec 40), Congo (sec 30), Cote d’Ivoire (sec 6), Egypt (sec 16&17), Eritrea (sec 21), Ethiopia (sec 41&90), Gabon (sec 1(8)), Gambia (sec 216), Ghana (sec 37(2)(b),6(b)), Guinea (sec 17), Liberia (sec 7), Libya (sec 6), Madagascar (sec 30), Malawi (sec 13), Mali (sec 17), Mozambique (sec 95), Niger (sec 19), Nigeria (sec 16(2)), Sao Tome & Principe (sec 43&53), Seychelles (sec 36&37), Sierra Leone (sec 8), South Africa (sec 27), Sudan (sec 11), Tanzania (sec 11), Togo (sec 33), and Uganda (sec 7&14).

¹⁹⁹ These are, alphabetically, Algeria (sec 54), Angola (sec 47), Benin (sec 8), Burkina Faso (sec 18&26), Burundi (sec 39), Cape Verde (sec 70), Comoros (pmb), Congo (sec 30), Cote d’Ivoire (sec 7), Egypt (sec 16&17), Equatorial Guinea (sec 22), Eritrea (sec 21), Ethiopia (sec 41&90), Gambia (sec 216(4)), Ghana (sec 30&36(10)), Guinea (sec 15), Lesotho (sec 27), Liberia (sec 8), Libya (sec 15), Madagascar (sec 19), Malawi (sec 13), Mali (sec 17), Mozambique (sec 54&94), Niger (sec 11&49), Nigeria (sec 17), Sao Tome & Principe (sec 49), Senegal (sec 8), Seychelles (sec 29), Sierra Leone (sec 8(3)), South Africa (sec 27), Sudan (sec 13), Tanzania (sec 11), Togo (sec 34), and Uganda (sec 20).

²⁰⁰ These are, alphabetically, Burkina Faso (sec 18), Cape Verde (sec 71), Ethiopia (sec 90), Mali (sec 17), Nigeria (sec 16(2)), Sao Tome & Principe (sec 48), Seychelles (sec 34), South Africa (sec 26), and Uganda (sec 14).

²⁰¹ These are, alphabetically, Ethiopia (sec 90), Gambia (sec 216(4)), Ghana (sec 36(e)), Malawi (sec 13), Nigeria (sec 16(2)), Sierra Leone (sec 7), South Africa (sec 27), and Uganda (sec 21&22).

²⁰² See South Africa Constitution sec 7(2).

infringement of any right entrenched therein.²⁰³ Conversely, Chapter II of the Nigerian Constitution is titled: “Fundamental Objectives and Directive Principles of State Policy”. Although this section contains provisions similar to those in human rights instruments guaranteeing socio-economic rights, the same Constitution provides that the judicial powers shall not extend to any issue or question covered by Chapter II.²⁰⁴ Such provisions continue to perpetuate the misconception that socio-economic rights are non-justiciable.

1.4.2 Between Vision and Reality

The international law recognition of socio-economic rights, with a mechanism for their safeguards, is one of Africa’s major contributions to the development of human rights norms. This, plus developments at municipal levels, laid the foundation for the human rights movement and mobilisation in Africa, providing a rallying point for all those concerned with promoting human dignity and well-being. These instruments have also jolted many states into adopting some poverty alleviation policies, though there is still a great gulf between vision and reality.

In certain communities in some parts of Africa, a privileged group of persons collectively have vastly more than they need to maintain an adequate standard of living, but massive poverty, unemployment, crime, homelessness and other pathologies

²⁰³ Above, sec 38. Cf *Certification* case (note 54 above) para 78 (affirming the justiciability of socio-economic rights under the South African Constitution); and *Grootboom* case (note 54 above) para 20 (holding, “the courts are constitutionally bound to ensure that they [socio-economic rights] are protected and fulfilled”).

²⁰⁴ Nigeria Constitution sec 6(6)(c).

generally plague the majority of SSA and show no signs of abating.²⁰⁵ Life is brutish, nasty, and short in most of Africa, most of the time. The future is still uncertain and nothing paralyzes as uncertainty. Many Africans live in extremely poor conditions and in squatter camps, as the facts of *Grootboom* case revealed:

The conditions under which most of the residents of Wallacedene lived were lamentable. A quarter of the households of Wallacedene had no income at all, and more than two thirds earned less than R500 per month. About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare.²⁰⁶

In Niger, the world's second poorest country after Sierra Leone, about 3.5 million people are facing extreme hunger and malnutrition. According to James Morris, Executive Director of UN World Food Program (WFP), "Whole families are suffering [in Niger] because of a desperate shortage of food, which has forced them to eat just one meal a day of maize, leaves or wild fruits".²⁰⁷

Africa still lags behind other continents in all indices of economic and human development. Few years ago, the OAU lamented: "We have noted, at the close of the

²⁰⁵ See NJ Udombana 'The Summer Has Ended and We are Not Saved! Towards a Transformative Agenda for Africa's Development' (2005) *San Diego International Law Journal* 5 11.

²⁰⁶ See *Grootboom* case (note 54 above) para 7. Cf CESCR 'The right to adequate housing (Art 11 (1))' General Comment 4 para 4 [hereinafter General Comment 4] ("Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing, there remains a disturbingly large gap between the standards set in article 11 (1) of the Covenant and the situation prevailing in many parts of the world").

20th century, that of all the regions of the world, Africa is indeed the most backward in terms of development from whatever angle it is viewed and the most vulnerable as far as peace, security and stability are concerned”.²⁰⁸ Empirical studies show that poverty still pervades Africa. The UN Conference on Trade and Development (UNCTAD) estimates that the proportion of populations living on less than \$1 a day in the Least Developed Countries (LDCs) in Africa²⁰⁹ has increased continuously since 1965–1969, rising from an average of 55.8 percent in those years to 64.9 percent in 1995–1999.²¹⁰ Other sources put the figure of Africans living on less than \$1 a day threshold at the dawn of the millennium at between 340 million²¹¹ to 600 million,²¹² with an average income of \$0.65 a day (calculated on the basis of Purchasing Power Parity (PPP)).²¹³ Africa’s share of people living in extreme poverty in the world²¹⁴ rose to 30 percent in 2000, from the

²⁰⁷ ‘As Niger’s Hunger Crisis Worsens, UN Agencies Greatly Increase Emergency Appeal’ *UN News Service* 3 Aug 2005 available at <http://www.allafrica.com/stories/200508030291.html>.

²⁰⁸ See Yaounde Declaration (Africa: Preparing for the 21st Century) AHG Decl 3 OAU AHG/Res 247-257 (XXXII)(July 1996) pmb1 [hereinafter Yaounde Declaration]. Cf H Kissinger *Does America Need a Foreign Policy? Toward a Diplomacy for the Twenty-first Century* (2002) 201 (noting the pervasiveness of poverty in Africa and stressing that the continent has the lowest economic growth rate of any continent and has lagged far behind in modernization).

²⁰⁹ Of the 49 countries currently classified as LDCs by the UN thirty-four are from Africa. They are: Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, The Comoros, D R Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, The Gambia, Guinea, Guinea Bissau, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, São Tomé and Príncipe, Senegal, Sierra Leone, Somalia, The Sudan, Togo, Uganda, United Republic of Tanzania and Zambia. See African Union (AU) Commission *Africa Our Common Destiny: Guideline Documents* (2004) 4 [hereinafter *Africa Our Common Destiny*] (noting also that “nearly three-fifths of the population of Sub-Saharan Africa live in the LDCs”; as above).

²¹⁰ See UNCTAD *Economic Development in Africa: From Adjustment to Poverty Reduction: What is New?* UNCTAD/GDS/AFRICA/2 (2002) 2.

²¹¹ See OAU The New Partnership for Africa’s Development (Oct 2001) para 4 [hereinafter NEPAD] available at www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oau/keydocs/NEPAD.pdf.

²¹² See *Africa Our Common Destiny* (note 209 above) 8.

²¹³ Above.

²¹⁴ Half of the world’s population lives on less than US \$2 per day, while a fifth live on less than US \$1 per day. See NEPAD (note 211 above) para 36.

initial 25 percent.²¹⁵ Available statistics indicate that Africa is unlikely to meet any of the Millennium Development Goals (MDG)²¹⁶ by 2015 or even in a decade thereafter. The World Bank maintains that even if Africa were to achieve a projected growth rate of 1.6 percent per capita, it would still be at the low end of the developing-country growth spectrum, “inadequate to make much of a dent in poverty and other MDGs”.²¹⁷

Among the internal factors that have brought leanness to Africa is states’ failure to address the structural problems that could reduce dependence on social safety nets. Spending on public health, housing and education and other social services has been severely curtailed over the years, resulting in a sharp decline in the quality of life in African countries. Food production has also fallen in proportion to the expanding population.²¹⁸ While Sudan and Ethiopia similarly wield mass starvation as a weapon of war,²¹⁹ Zimbabwe has pursued a devastating policy of evictions for residents of slums across the country in what tantamount to a gross human rights violation and, in fact, an economic crime against humanity.²²⁰ There is also the problem of corruption and mismanagement of resources. Nigeria, like many African countries, is rich in natural

²¹⁵ See *Africa Our Common Destiny* (note 209 above) 8.

²¹⁶ See Millennium Development Goals 2000 para I–2 available at <http://www.un.org/millenniumgoals/> [hereinafter MDG].

²¹⁷ World Bank *Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda* (2003) 43 [hereinafter *Global Economic Prospects 2004*].

²¹⁸ See OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World AHG/Decl 1 (XXVI) (July 1990) [hereinafter Declaration on the Political and Socio-Economic Situation in Africa] para 6.

²¹⁹ See, in general, D Marcus ‘Famine Crimes in International Law’ (2003) 97 *American Journal of International Law* 245.

²²⁰ See AK Tibaijuka *Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina* (2005) 7 available at <http://www.reliefweb.int/rw/RWB.NSF/db900SID/HMYT-6EJM2G?OpenDocument>.

resources,²²¹ but political instability, corruption, inadequate infrastructure, and poor macroeconomic management have hobbled the country. The result of such endogenous factors is that majority of Nigerians have been victims rather than beneficiaries of these resources. I shall examine these challenges in Chapter Three in detail.

States' compliance with reporting obligations under existing treaties protecting socio-economic rights remain relatively poor, as the practice of the African Commission shows. 19 countries were yet to submit a report to the Commission in 2003, including Botswana, Zambia, and Cote D'Ivoire.²²² Of the fifty-three State Parties to the African Charter, twenty-three have not submitted a single report since their ratification of the Charter,²²³ several others are in arrears, and not a single country is up-to-date with its reporting obligations. Some countries submit reports without sending representatives to the African Commission to present them. The Commission has repeatedly postponed consideration of the only report submitted by Seychelles because the government did not send representatives to present it.²²⁴

An empirical understanding of Africa's peculiar situation, as highlighted above, is of crucial importance in the task of advancing socio-economic rights. African states should not only respect human and peoples' rights; they should also adopt positive measures to

²²¹ Nigeria is blessed with abundant natural resources: natural gas, petroleum, tin, iron ore, coal, limestone, niobium, lead, zinc, arable land. Nigeria has a proven oil reserve of 36 billion bbl and proven natural gas reserve of 4.007 trillion cu m. See Central Intelligence Agency (CIA) *The World Factbook: Nigeria* at <http://www.cia.gov/cia/publications/factbook/geos/ni.html> (last visited 14 Feb 2006).

²²² African Comm'n on Human & Peoples' Rights *Status on Submission of State Periodic Reports to the African Commission on Human and Peoples' Rights* (May 2003) available at the ACHPR Web site.

²²³ The twenty-three states are Botswana, Cameroon, Central African Republic, Comoros, DR Congo, Cote D'Ivoire, Djibouti, Equatorial Guinea, Ethiopia, Eritrea, Gabon, Guinea-Bissau, Kenya, Liberia, Madagascar, Malawi, Mauritania, Niger, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Sierra Leone, Somalia, and Zambia.

²²⁴ See NJ Udombana 'Can the Leopard Change Its Spots? The African Union Treaty and Human Rights' (2002) 17 *American University International Law Review* 1177 1240 (discussing the frustrations of the African Commission with respect to reporting obligations of states under the African Charter).

implement their commitments to human rights instruments.²²⁵ Similarly, legislative measures alone will not lead to the actualisation of socio-economic rights. Appropriate, well-directed policies and programmes aimed at expeditiously and effectively advancing these rights must support such measures.²²⁶

Mere indignation at poverty is a generous passion, but it is not enough. Poverty is an evil, “the affliction which actually or potentially includes all other afflictions”.²²⁷ Poverty, says Appadurai, “is many things, all of them bad. It is material deprivation and desperation. It is lack of security and dignity. It is exposure to risk and high costs for thin comforts. It is inequality materialized. It diminishes its victims”.²²⁸ Deep poverty is an assault on human dignity, as it excludes its victim from full participation in the life of the society. It increases desperation and tempts the poor to take the law into his hands or to turn into prostitution or crime in order to escape destitution. The most dangerous creation of any society is that man who has nothing to lose. Such inglorious actions devalue not only the actor but also the entire society.

The society must find practical ways to alleviate poverty, “lest it steal[s] away patience and humility from those who suffer and plant[s] anger and cynicism in their stead”.²²⁹ I hold the view, with Soyinka,

²²⁵ On the notion of obligations, see Chapter Two below.

²²⁶ See *Grootboom* case (note 54 above) para 42.

²²⁷ CS Lewis *The Problem of Pain* (1940) 96.

²²⁸ Appadurai “The Capacity to Aspire: Culture and the Terms of Recognition in V Rao & M Walton (eds) *Culture and Public Action* (2004) 59 64.

²²⁹ Lewis (note 227 above) 96.

that there should be no beggars in society, that it is the responsibility of the state, the community, to look after its less fortunate, either create a means of livelihood for them or else house and feed them in some kind of commune, not leave them on the streets, dependent on the uncertain generosity of others.²³⁰

1.5 Conclusion: In Solidarity with Socio-economic Rights

The proposition that all rights are interwoven and equally important is not merely a theoretical postulate, but a “fundamental tenet” of the international community’s commitment to human rights.²³¹ Justiciability is not necessarily a matter of perfectly dissecting and distinguishing the inseparable, but of finding the key relations between apparently separate notions. The indivisibility of human rights has practical significance in a society founded on human dignity, equality, and freedom and is fundamental to evaluation of the reasonableness of a state action, requiring all stakeholders to take into account the inherent dignity of human beings.²³² Socio-economic rights, in particular, have “implications for the methodology and philosophy that we deploy in interpreting, explaining, or communicating all rights”.²³³ They task societies to devise creative ways to provide remedies, which can take a myriad of forms.

²³⁰ W Soyinka *You Must Set Forth At Dawn: A Memoir* (2006) 324. C S Lewis also reflects on the basic functions of a state thus: “The State exists simply to promote and to protect the ordinary happiness of human beings in this life. A husband and wife chatting over a fire, a couple of friends having a game of darts in a pub, a man reading a book in his own room or digging in his own garden—that is what the state is there for. And unless they are helping to increase and prolong and protect such moments, all the laws, parliaments, armies, courts, police, economics, etc., are simply a waste of time”. CS Lewis *Mere Christianity* (1944) 167.

²³¹ See A Eide ‘Realization of Social and Economic Rights and the Minimum Threshold Approach’ (1989) 10 *Human Rights Law Journal* 35.

²³² See *Grootboom* case (note 54 above) para 83.

²³³ Odinkalu ‘Analysis of Paralysis or Paralysis by Analysis?’ (note 157 above) 335-36.

Scholars concerned with utilitarian ends of law must continue to refute claims and prejudices that have long hampered efforts towards the actualisation of socio-economic rights. If these prejudices are allowed to fester, they could “constitute an incentive to decision-makers not to pursue policies designed to bring about a more effective implementation of everyone’s rights”.²³⁴ Another reason to press forward with the banner of socio-economic rights is the increasing dangers that these rights face in an era of corporate-led globalisation. As Justice Cançado of the Inter-American Court of Human Rights bluntly stated: “In times of the so-called ‘globalization’ (the misleading and false neologism which is en vogue in our days), the frontiers have opened to the capitals, goods and services, but have sadly closed themselves to human beings”.²³⁵ The non-enforcement of socio-economic has already marginalised the poorest, most vulnerable, groups in society and ridiculed the so-called autonomy of the individual.²³⁶ Their claims

²³⁴ Hoof (note 160 above) 98.

²³⁵ Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants Inter-Am Ct HR (17 Sept 2003) para 16 (Cançado J concurring) [hereinafter OC-18 Cançado Concurrence].

²³⁶ SC Agbakwa ‘Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights’ (2002) 5 *Yale Human Rights and Development Law Journal* 177 184 (arguing: “Adequate socio-economic conditions must exist as a precondition to personal autonomy”) citing D Warner ‘An Ethics of Human Rights: Two Interrelated Misunderstandings’ (1996) 24 *Denver Journal of International Law and Policy* 395 411.

remain “the only means of self-defense for millions of impoverished and marginalized individuals and groups all over the world”.²³⁷

²³⁷ R Kunnemann ‘A Coherent Approach to Human Rights’ (1995) 17 *Human Rights Quarterly* 323 332.

Chapter Two

SOCIO-ECONOMIC RIGHTS AND THE NOTION OF OBLIGATIONS

2.1 Introduction

The assumption, express or implied, that all legal relations may be straight-jacketed into “rights” and “duties” and that such simple categorizations are adequate for analysing even the most complex legal interests has often hindered a clear understanding of, and true solution to, legal problems. Hohfeld wrote his seminal work—*Fundamental Legal Conceptions*—to remove such possible hindrances.¹ He placed (human) rights in the first category of jural relations, meaning that they entail correlative duties or obligations towards rights-holders.² This Chapter interrogates the nature of such duties *vis-à-vis* socio-economic rights as well as the bearers of these duties. This question is important because, as Shue argues, “[a] complete account of a human right must specify the correlative duties and the relevant agents: what needs to be done in order to fulfill the right and who ought to do it”.³

The development of human rights has primarily been state-centric, for many reasons. First, states alone have the right to use force to uphold international law and, *a fortiori*,

¹ See, in general, WN Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (WW Cooke ed 1919).

² See eg E Brems *Human Rights: Universality and Diversity* (2001) 424 (“For each right, there are not only right-holders, but also duty-bearers, against whom the right can be invoked”).

³ H Shue ‘The Interdependence of Duties’ in P Alston & K Tomasevski (eds) *The Right to Food* (1984) 83 83.

human rights.⁴ Second, the state is the primary *raison d'être* for the corpus of human rights, a predator that must be contained to safeguard human freedom.⁵ My central thesis is that institutional paradigm shifts are necessary to complement states' implementation of obligations arising from socio-economic rights. While this Chapter examines the traditional characterization of obligations, Chapter Five will go beyond this characterization and argue for a horizontal application of human rights obligations to non-state actors operating in Africa.

The first segment of this Chapter examines states' obligations under treaty and constitutional law. The second segment examines the typology of obligations, using the jurisprudence of the African Commission as a template for analysis. The final segment examines the "minimum core content" of obligations on socio-economic rights, a necessary exercise in determining the scope of states' obligations to develop reasonable legislative and other measures to realise human rights.

2.2 Examining State Obligations on Socio-Economic Rights

International law draws no differentiation regarding the legal origin of an international obligation, but treaties constitute one of the principal sources of such an obligation.⁶ Multilateral treaties, in particular, contribute to the formation of international human rights law. Henkin has written that the purpose of international human rights law "is to

⁴ See HN Bull *The Anarchical Society* (1977) 68.

⁵ See HJ Steiner 'The Youth of Rights' (1991) 104 *Harvard Law Review* 917 928-33 (reviewing L Henkin *The Age of Rights* (1990)). See M Mutua 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201 220.

⁶ See M Fitzmaurice 'The Identification and Character of Treaties and Treaty Obligations Between States in International Law' (2003) 73 *British Yearbook of International Law* 141 144 (noting: "Treaties, as a source of international obligations and of responsibility arising from a breach of such obligations, are not distinct from other sources of international law").

influence states to recognize and accept human rights, to reflect these rights in their national constitutions and laws, to respect and ensure their enjoyment through national institutions, and to incorporate them into national ways of life”.⁷ These obligations rest on the fundamental principle *pacta sunt servanda*, which, by interpretation, means that agreements are binding on parties to it and they must implement them in good faith.⁸

As a principle of customary and treaty law, *pacta sunt servanda* is “an absolute postulate of the international legal system and manifests itself in one way or another in all the rules belonging to international law”.⁹ The principle operates both at the domestic and international plane. Although states may have varying domestic attitudes regarding the status of international law, treaty laws, in particular, are binding upon parties on the international level, regardless of any internal law to the contrary.¹⁰

This segment examines the development of states’ obligations under treaty law as well as under constitutional law, with emphasis on socio-economic rights.

2.2.1 *Universal International Law on State Obligations*

The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹¹ is justly the template for considering multilateral treaty obligations on socio-economic

⁷ L Henkin ‘International Human Rights and Rights in the United States’ in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (1984) 25 25.

⁸ Cf Vienna Convention on the Law of Treaties 23 May 1969 UN Doc A/conf 39/27 1155 UNTS 331 [hereinafter Vienna Convention] art 26. The Vienna Convention is largely a codification of customary law. See M Shaw *International Law* (2003) 811; I Brownlie *Principles of Public International Law* (5th ed 1998) 608 (noting that many articles of the Vienna Convention are declaratory of existing law and that those which are not certainly constitute presumptive evidence of emergent rules of general international law); and *North Sea Continental Cases* (1966) ICJ Reports 12.

⁹ IA Shearer *Starke’s International Law* (11th ed 1994) 22.

¹⁰ See Vienna Convention (note 8 above) art 27 (providing that a “party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”).

rights, as it was the first treaty to focus specifically on this specie of rights. The ICESCR is particularly relevant to the understanding of the nature of obligations under regional and national human rights guarantees in Africa, with the CESCR General Comments as aids to interpretation. Though the General Comments are descriptive of how states comply with their obligations under the ICESCR, they serve “as a means of developing a common understanding of the norms by establishing a prescriptive definition”.¹²

Chapter One spotlighted some of the rights that the ICESCR guarantees, but the Covenant also creates several obligations in respect of those guarantees. Article 2 reads: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.¹³ When rights entail positive duties, it may be preferable to specify those duties, which is more concrete than proclaiming rights.¹⁴ Thus, the undertaking “to take steps”, in French *s’engage à agir* (“to act”) and in Spanish *a adoptar medidas* (“to adopt measures”), is an alternative way of formulating rights.

¹¹ International Covenant on Economic, Social and Cultural Rights adopted 16 Dec 1966 entry into force 23 Mar 1976 993 UNTS 3 [hereinafter ICESCR].

¹² M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (1995) 91.

¹³ ICESCR (note 11 above) art 2(1).

¹⁴ Cf above, art 3 (“The States Parties to the present Covenant undertake to ensure ...”); African Charter on Human and Peoples’ Rights adopted 27 June 1981 entry into force 21 Oct 1986 Doc OAU/CAB/LEG/67/3/Rev5 (1982) 21 *International Legal Materials* 59 [hereinafter African Charter] art 1 (“The Member States ... shall recognize ...”); and art 25 (“States Parties to the present Charter shall have the duty to promote and ensure ...”); and art 26 (“States Parties to the present Charter shall have the duty to guarantee ...”).

Such an undertaking is “not qualified or limited by other considerations”¹⁵ and, though the steps include the adoption of legislative measures, it is by no means exhaustive of states’ obligations.¹⁶

The general obligation in the ICESCR has “a dynamic relationship with all of the other provisions of the Covenant”.¹⁷ To give effect to its provisions in domestic law, “the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place”.¹⁸ While each State Party reserves the liberty to decide the most appropriate means with respect to each right, a state must bear in mind that the “appropriateness” of means chosen is not always self-evident.¹⁹ The CESCR maintains that while the full realization of the relevant rights may be achieved progressively, steps taken towards this goal should be “within a reasonably short time after the Covenant’s entry into force for the States concerned [and] ... should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant”.²⁰

Furthermore, the ICESCR commits States Parties to guarantee the rights enunciated in the Covenant “without discrimination of any kind as to race, colour, sex, language,

¹⁵ CESCR General Comment 3 ‘The Nature of State Parties’ Obligations (art 2(1) para 2 of the Covenant)’ (5th session 1990) UN Doc E/1991/23 [hereinafter CESCR General Comment 3] *reprinted in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* at 18 UN Doc HRI/GEN/1/Rev 5 (2001).

¹⁶ Above, para 4.

¹⁷ Above, para 1.

¹⁸ ‘The Domestic Application of the Covenant’ Committee on Economic, Social and Cultural Rights (CESCR) General Comment 9 UN Doc E/C12/1998/24 3 Dec 1998 para 2 [hereinafter General Comment 9].

¹⁹ Above.

²⁰ Above, para 2.

religion, political or other opinion, national or social origin, property, birth or other status”.²¹ Most UN human rights instruments prescribe non-discrimination in an article of general application, expressed to extend to all the specific rights that they declare.²² The UN Charter, which contains the shortest non-discrimination catalogue,²³ provides the touchstone for these other instruments prohibiting discrimination. The ICESCR further commits states “to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights” as set out in the Covenant.²⁴

The principles of equality and non-discrimination are closely linked. Equality is a positive expression of non-discrimination; and non-discrimination is fundamental to the concept of human rights. First, it is an explicit guarantee of equal—and thus all—human rights for every person.²⁵ What distinguishes human rights from other rights is their universality, meaning that the rights “inhere” in every human being by virtue of their humanity alone.²⁶ Second, human rights seek to protect the uniqueness of each individual, which underpins the concept of integrity and dignity. For these and other reasons, human rights law does not permit discrimination against individuals, though it

²¹ ICESCR (note 11 above) art 2(2).

²² See eg Universal Declaration of Human Rights adopted 10 Dec 1948 GA Res 217 A (III) GAOR 3d Sess [hereinafter UDHR] arts 2 & 7; International Covenant on Civil and Political Rights adopted 16 Dec 1966 entry into force 23 Mar 1976 GA Res 2200 A (XXI); UN GAOR 21st Sess Supp No 16 UN Doc A/6316 (1966) 999 UNTS 171 [hereinafter ICCPR] arts 2(1) 3 & 26.

²³ See UN Charter, arts 1(3) 55(c) & 76(c) (limiting the prohibited grounds only to the four factors of race, sex, language, and religion).

²⁴ ICESCR (note 11 above) art 3.

²⁵ See J Donnelly *Universal Human Rights in Theory and Practice* (2003) 225. Cf African Charter (note 14 above) pmb1 (providing that human rights stem from the attributes of human beings, which justifies their international protection).

²⁶ See P Sieghart *The International Law of Human Rights* (1983) 75.

may be legitimate, from the legal or ‘ordinary’ rights perspective, “to differentiate between individuals in different circumstances and for different reason”.²⁷

The ICESCR also contains specific obligations relating to specific rights. It commits states to “take appropriate steps to ensure the realization” of “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”.²⁸ Such steps should take into cognisance “the essential importance of international co-operation based on free consent”.²⁹ The CESCR gives a holistic interpretation to the term “housing” sense.³⁰ The term “housing”, according to the Committee, derives from the right to an adequate standard of living and should be interpreted in a way that takes account of a variety of other considerations. Thus, “housing” should be defined as “adequate housing”, meaning the right to live somewhere in security, peace and dignity.³¹

In relation to the right to the enjoyment of the highest attainable standard of physical and mental health, the ICESCR obligates states to take necessary steps to improve all aspects of environmental and industrial hygiene;³² to prevent, treat, and control epidemic, endemic, occupational and other diseases;³³ and to create conditions that assure medical

²⁷ Above, 17.

²⁸ ICESCR (note 11 above) art 11(1).

²⁹ Above.

³⁰ General Comment No 4 *The Right to Adequate Housing (art 11 para 1 of the Covenant)* (13 Dec 1991) [hereinafter CESCR General Comment 4] para 7.

³¹ Above.

³² ICESCR (note 11 above) art 12(2)(b).

³³ As above, art 12(2)(c).

service and medical attention to all in the event of sickness.³⁴ Later multilateral human rights treaties are more specific in addressing health issues, for example the Convention on the Rights of the Child,³⁵ which obligates states to provide all children with “adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution”.³⁶ Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women³⁷ obligates states to ensure to women the right to “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply”.³⁸

The ICESCR also contains an undertaking by States Parties to submit, in conformity with the Covenant, “reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein”.³⁹ State reporting on socio-economic rights constitutes an important source of obligation. Such reporting forms part of the practice of states, a vital ingredient for the formation of customary law. In general, the reporting process provides a unique form of international accountability for how states implement their international human rights obligations. It is also a tool for policy development and planning and for the promotion of rights. The ICESCR report, in particular, assists each State Party to fulfil its obligations under the Covenant and

³⁴ As above, art 12(2)(d).

³⁵ Convention on the Rights of the Child 20 Nov 1989 144 UNTS 123.

³⁶ Above, art 24.

³⁷ Convention on the Elimination of All Forms of Discrimination Against Women GA Res 180 UN GAOR 34th Sess Supp No 34 at 193 UN Doc A/34/46 (1981).

³⁸ Above, art 14(2)(h).

³⁹ ICESCR (note 11 above) art 16(1). Cf ICCPR (note 22 above) art 40(1) (providing that the parties to the Covenant “undertake to submit periodic reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights”).

provides a basis for the Economic and Social Council (ECOSOC) to discharge its responsibilities for monitoring States' compliance with their obligations. More importantly, it facilitates the realization of socio-economic rights.⁴⁰

2.2.2 *Regional (African) International Law on State Obligations*

Architects of the African Charter were careful to avoid the irritating “progressive realization” clause of the ICESCR, since the satisfaction of socio-economic rights is a guarantee to the enjoyment of their civil and political counterparts.⁴¹ Everyone is entitled to enjoy the rights that the Charter guarantees without distinction of any kind, whether on the basis of race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.⁴² (The Charter, however, qualifies some socio-economic rights; for example, it provides for the right to enjoy the “best attainable” state of physical and mental health.⁴³) These grounds are not intended to be exhaustive but are listed as examples, which explains why such other international instruments like the American Declaration adds “or any other factor”.⁴⁴

⁴⁰ See General Comment No 1 *Reporting by States Parties* E/1989/22 (1989) [hereinafter CESCR General Comment 1] para 1 (discussing the objectives of state reporting). See also, in general, P Alston ‘The Purposes of Reporting’ in *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* UN Doc HR/PUB/91/1 at 13-16 (1991) (delineating seven stages of State reporting system in international human rights law, each stage serving specific functions).

⁴¹ See African Charter (note 14 above) pmbl.

⁴² Above, art 2. Cf UDHR (note 22 above) art 2 with the common arts 2(1) of ICESCR and ICCPR.

⁴³ Above, art 16(1).

⁴⁴ American Declaration, art 11. Cf ACHR art 1(1) (omits “property” or “other status” from its catalogue and substitutes “economic status” and “any other social condition”).

The African Charter enjoins States Parties to alter their laws and practices that allow discrimination,⁴⁵ though certain legal inequalities might be used to correct factual inequalities. In the *Belgian Linguistic case* (No 2),⁴⁶ the European Court stressed that in determining whether there has been discrimination, a Court must not disregard the legal and factual features characterizing the life of the society in the State concerned.⁴⁷

The principle of non-discrimination is essential to the spirit of the African Charter.⁴⁸ Furthermore, the Charter is unique in its inclusion of *ethnicity* among the prohibited grounds of differentiation, probably to underscore the central importance of ethnicity in Africa. There are no equivalent provisions in the UDHR, the Human Rights Covenants, or the American Convention; the closest approximation is the ECHR's "association with a national minority".⁴⁹ Ethnicity as a ground of discrimination was canvassed before the African Commission in *Organisation Mondiale Contre la Torture and Association Internationale des juristes (C.I.J.) Union Inter africaine des Droits de l'Homme v Rwanda*.⁵⁰ In that case, the Government of Rwanda denied numerous rights to individuals, on account of their nationality or membership of a particular ethnic group. The Commission held that such denials violated Article 2 of the Charter.

⁴⁵ See African Charter (note 14 above) art 2.

⁴⁶ *Belgian Linguistic case* (No 2) A 6 (1968) 1 EHRR 252.

⁴⁷ As above, para 10 (holding also that "the principle of equality of treatment is violated if the distinction has no objective and reasonable justification").

⁴⁸ See *Purohit v The Gambia* Comm No 241/2001 para 64 2002-2003 African Annual Activity Report Annex VII [hereinafter *Purohit v The Gambia*] para 49.

⁴⁹ ECHR art 14.

⁵⁰ *Organisation Mondiale Contre la Torture and Association Internationale des juristes (CIJ) Union Inter africaine des Droits de l'Homme v Rwanda* Comm Nos 27/89 46/91 49/91 & 99/93.

The Charter obligates states to recognize all rights, duties and freedoms that it enshrines and to adopt legislative or other measures to give effect to them.⁵¹ Legislative measures obviously include enactments that bring domestic laws in conformity with the Charter. A ratifying state that fails to do so defeats “the very object and spirit of the Charter” and is in violation of Article 1.⁵² The phrase “other measures” also provides State Parties with a wide choice of measures, including budgetary measures, to use in dealing with human rights problems in Africa.⁵³

The African Charter further calls on states to “promote and ensure” respect of the rights and freedoms contained therein “through teaching, education and publication” and “to see to it that these freedoms and rights as well as corresponding obligations and duties are understood”.⁵⁴ The high degree of illiteracy in Africa may have informed this unique provision. Bello believes that the “[d]issemination of information about human rights in the African Charter is [probably] the greatest need that the peoples’ of the African continent have at this present moment”.⁵⁵ If this obligation is acted upon “with imagination”, it “could prove useful in developing a useful program of human rights education in Africa”.⁵⁶

⁵¹ Above, art 1.

⁵² See *Lawyers for Human Rights v Swaziland* Comm No 251/2002 2004 Annual Activity Report of the African Commission EX.CL/199 (VII) Annex III (2005) [hereinafter *Lawyers for Human Rights v Swaziland*] para 51.

⁵³ Above, para 50.

⁵⁴ African Charter (note 14 above) art 25. Cf art 45(1) (on the promotional mandate of the African Commission).

⁵⁵ E Bello ‘The Mandate of the African Commission on Human and Peoples’ Rights’ (1988) 1 *African Journal of International Law* 31 34.

⁵⁶ T Buergenthal *International Human Rights in a Nutshell* (1995) 239.

Other obligations in the African Charter includes the elimination of all forms of foreign and domestic economic exploitation of natural resources⁵⁷ and, what is especially African, the obligation to “assist the family which is the custodian of morals and traditional values recognized by the community”.⁵⁸ The African Charter also enjoins States Parties “to guarantee the independence of the Courts and ... [to] allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter”.⁵⁹ The Charter’s provision clearly envisions the establishment, funding, and protection of courts, which, traditionally, have been a bastion of the individual’s rights against the abuse of state power.⁶⁰ Of course, “the purpose of requiring that courts be “established by law” is that the organisation of justice must not depend on the discretion of the Executive, but must be regulated by laws emanating from parliament”.⁶¹

It is not clear from the Charter’s provisions if “national institutions” refer only to governmental and non-governmental institutions, but both types of bodies are essential to giving meaning and content to the rights guaranteed in the Charter. They could, in particular, “play an important promotional role in legitimating the human rights debate in individual African countries”.⁶² The African Commission has also encouraged and supported the establishment of national human rights commissions as engines for the

⁵⁷ See African Charter (note 14 above) art 21.

⁵⁸ Above, art 18.

⁵⁹ Above, art 26.

⁶⁰ See *Civil Liberties Organisation (in re Nigerian Bar Ass’n) v Nigeria* Comm No 101/93 1994–1995 African Annual Activity Report Annex VI [hereinafter *CLO v Nigeria*] para 14.

⁶¹ *Civil Liberties Organisation, Legal Defense Center, Legal Defense and Assistance Project v Nigeria* Comm No 218/98 2000–2001 African Annual Activity Report Annex V [hereinafter *Civil Liberties et al v Nigeria*] para 26.

promotion of human rights. In this effort, the Commission adopted a resolution inviting “all the States, parties to the Charter, where no national institutions as yet exist for the promotion and protection of human rights, to take appropriate measures to establish such institutions”.⁶³

In 1993, the then OAU adopted the Resolution on the African Commission,⁶⁴ which requested all States Parties to implement Article 26 of the African Charter by establishing and strengthening national institutions with responsibility for promoting and protecting human and peoples’ rights. Pursuant to, or in spite of, these resolutions, many states have established national human rights institutions. One of the earliest countries to do so was Togo, which established an autonomous National Human Rights Commission in 1987 to protect and promote civil and political rights; organize seminars and symposia; and generally enlighten the population on human rights. The Commission also expresses views and recommends measures to the government aimed at protecting and promoting human rights.⁶⁵ Ghana established the office of Ombudsman in 1980—“due to the complexity of the administrative functions and structures of the modern state”—“to

⁶² Buergenthal *International Human Rights in a Nutshell* (note 56 above) 239.

⁶³ ‘Resolution on the Establishment of Committees on Human Rights or Other Similar Organs at National, Regional or Sub-Regional Levels’ in *Recommendations and Resolutions adopted by the African Commission on Human and Peoples’ Rights* 12. Cf ‘Recommendation on Modalities for Promoting Human and Peoples’ Rights’ in *Recommendations and Resolutions adopted by the African Commission on Human and Peoples’ Rights* [hereinafter *Modalities for Human Rights Promotion*] 13 (calling on state parties to the African Charter to “establish national and regional institutes of human and peoples’ rights responsible for conducting studies and researches in co-operation with the African Commission . . . and for disseminating the knowledge and information on human and peoples’ rights”).

⁶⁴ See ‘Resolution on the African Commission on Human and Peoples’ Rights’ OAU AHG/Res 227(XXIX) Rev I (June 1993).

⁶⁵ See Togo Constitution sec 156.

provide simpler and cheaper redress for persons who suffered from unreasonable or unlawful actions of administrative bodies and officials”.⁶⁶

At the beginning of 2000, 24 African countries had provisions in their laws for national human rights bodies.⁶⁷ These institutions, which take the form of commissions or ombudspersons, are created to ensure the application of international human rights norms in the domestic sphere and to monitor the observance of human rights nationally.⁶⁸ They are administrative in nature and have ongoing, advisory authority with respect to human rights at the national and/or international level. They may pursue their purposes either in a general way, through opinions and recommendations, or through the consideration and resolution of complaints submitted by individuals or groups.

Like most human rights instruments, the African Charter provides for State reporting obligations: “Each State party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving affect to the rights and freedoms recognised and guaranteed by the present Charter”.⁶⁹ The reporting obligation, says the African Commission, “enables the States to constantly check the whole government machinery as it forces the relevant government institutions from all the departments and ministries to evaluate legal regulations, procedures and practices *vis-à-vis* the provisions guaranteed in the

⁶⁶ See EF Short ‘The Role of the Commission on Human Rights and Administrative Justice under Ghana’s Fourth Republic’ (1997) 9 *African Society of International & Comparative Law Proceedings* 185.

⁶⁷ ME Tsekos ‘Human Rights Institutions in Africa’ (2002) 9 *Human Rights Brief* 21 21.

⁶⁸ See B Pityana ‘South Africa’s Inquiry into Racism in the Media: The Role of National Institutions in the Promotion and Protection of Human Rights’ (2000) 99 *African Affairs* 525.

⁶⁹ African Charter (note 14 above) art 62. *See also* Rules of Procedure of the African Commission on Human and Peoples’ Rights (Amended) adopted 6 Oct 1995 Rule 81(1) Doc ACHPR/RPT/XIX [hereinafter ACHPR Rules].

Charter”.⁷⁰ State reports under the African Charter vary widely in their quality and content; likewise the character of the discussions. Usually, they contain information on national constitutions and other legislation affecting human rights, organization and functioning of courts, status of the judiciary, the Supreme Court, and the bar.⁷¹

In general, the obligations under the African Charter are peremptory, that is to say states *shall* undertake.⁷² A State’s obligation under the ICCPR is “to respect and to ensure” those rights and freedoms for the beneficiaries,⁷³ whereas under the ECHR, it is to “secure” the rights and freedoms defined in the Convention.⁷⁴ Under the American Convention, States “undertake to respect the rights and freedoms recognized [therein] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms”.⁷⁵

2.2.3 *Municipal (Constitutional) Law on State Obligations*

As highlighted in Chapter One, many national constitutions guarantee socio-economic rights, but they also contain specific obligations in relation to these rights, the rationale

⁷⁰ African Commission, State Reporting Procedure: Information Sheet No 4 [hereinafter Reporting Procedure] *available at* the ACHPR Web site.

⁷¹ See, in general, A Danielsen *The State Reporting Procedure under the African Charter* (1994).

⁷² See *Legal Resources Foundation v Zambia* Comm No 211/98 2000-2001 Annual Activity Report of the African Commission Annex V [hereinafter *Legal Resources Foundation v Zambia*] para 62.

⁷³ ICCPR (note 22 above) art 2(1).

⁷⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature 4 Nov 1950 ETS No 5 213 UNTS 221 *as amended by* Protocol No 11 (entry into force 1 Nov 1998) ETS No 155 (1994) 33 *International Legal Material* 960 [hereinafter European Convention or ECHR] art 1.

⁷⁵ American Convention on Human Rights (also known as the Pact of San Jose Costa Rica) entry into force 18 July 1978 OATS No 36 at 1 OAS Doc OEA/Ser K/XVI/1 1 Doc 65 Rev 1 Corr 1 (1970) [hereinafter American Convention] art 1(1).

being that it is within national legal systems that people live their everyday lives.⁷⁶ Several of these constitutions couch their obligations in general terms, while others simply embed these obligations in the specific rights. The Constitution of Ghana represents the former while that of Angola represents the later. The Constitution of Ghana contains this general provision:

The fundamental human rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural persons in Ghana, and shall be enforceable by the courts as provided for in this Constitution.⁷⁷

The Angolan Constitution commits the state, “with the collaboration of the family and society”, to “*promote* the harmonious development of the personality of young people and *create conditions* for the fulfilment of the economic, social and cultural rights of the youth, particularly in respect of education, vocational training, culture, access to a first job, social security, physical education, sport and the use of leisure time”.⁷⁸ In relation to the right to work, the Constitution of Benin commits the state to *recognize* such a right to all citizens and to “strive to *create conditions* which shall make the enjoyment of this right effective and [to] *guarantee* to the worker just compensation for

⁷⁶ See NJ Udombana ‘So Far So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples Rights’ (2003) 97 *American Journal of International Law* 1 9 (stating that rights, like charity, must begin at home).

⁷⁷ Constitution of Ghana sec 12(1).

⁷⁸ Constitution of Angola sec 31 (italics supplied).

his services or for his production”.⁷⁹ In respect of the right to education, the Constitution of Sao Tome and Principe couches the obligation thus: “It is the responsibility of the State to *promote* the elimination of illiteracy and permanent education, in accordance with a national system of instruction. The state *ensures* basic compulsory and free education. The state gradually *promotes* the possibility of equal access to the other levels of education”.⁸⁰

Some constitutions contain both general and specific obligations. The South African Constitution commits the state to implement socio-economic rights⁸¹ and to “*respect, protect, promote and fulfil* the rights in the Bill of Rights”,⁸² a provision that Brand says “is central to the transformative ethos of the Constitution”.⁸³ Concerning some specific rights, the Constitution commits the state to “take reasonable legislative and other measures” to make it possible for citizens to gain access to land,⁸⁴ to adequate housing,⁸⁵ and to health care services.⁸⁶ It also obligates the state to take “reasonable legislative and other measures” to ensure that “[e]veryone has the right to have the environment protected”.⁸⁷ It directs the state to take “reasonable measures” to ensure that the right to

⁷⁹ Constitution of Benin sec 30 (italics supplied).

⁸⁰ Constitution of Sao Tome & Principe sec 54(2)-(3) (italics supplied).

⁸¹ Constitution of South Africa sec 2.

⁸² Above sec 7(2) (italics supplied).

⁸³ D Brand ‘Introduction to socio-economic rights in the South African Constitution’ in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 19.

⁸⁴ Constitution of South Africa sec 25(5).

⁸⁵ As above sec 26(2).

⁸⁶ As above sec 27(2).

⁸⁷ Above sec 24(b).

education is “progressively available and accessible”.⁸⁸ These provisions, again to cite Brand, are intended to serve as “blueprints for the state’s manifold activities that proactively guide and shape legislative action, policy formulation and executive and administrative decision-making”.⁸⁹

2.3 The Typology of Obligations

This segment examines the typology of human rights obligations, which is not necessarily exclusive but is dictated by the jurisprudence of human rights tribunals and writings of publicists. It was Shue who first suggested in 1980 that every basic right, and most other moral rights, could be analysed using a simple tripartite typology of interdependent duties of avoidance, protection, and aid.⁹⁰ This typology, according to Shue, mixes together in various proportions in the implementation of almost every right.⁹¹ Other commentators have revised Shue’s typology and categorized human rights obligations as involving the duty to respect, protect, ensure, and promote human rights.⁹² The African Commission adopted this later typology in its analysis of human rights obligations in the now famous *SERAC* case;⁹³ likewise the Inter-American Court of

⁸⁸ Above sec 29(1)(b).

⁸⁹ Brand ‘Introduction’ (note 83 above) 2.

⁹⁰ See H Shue *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980).

⁹¹ Cf Shue ‘The Interdependence of Duties’ (note 3 above) 84.

⁹² See eg GJH Van Hoof ‘The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views’ in *The Right to Food* (note 3 above) 97 106-108. Cf A Eide ‘The Right to Adequate Food as a Human Right’ UN Doc E/CN4/Sub2/1983/25.

⁹³ See *Social & Economic Rights Action Center & Anor v Nigeria* Comm No 155/96 2001–2002 African Annual Activity Report Annex V [hereinafter *SERAC* case]. See, in general, NJ Udombana ‘Between Promise and Performance: Revisiting States’ Obligations under the African Human Rights Charter’ (2004) 40(1) *Stanford Journal of International Law* 105.

Human Rights, in the *Velazquez Rodriguez* case.⁹⁴ I shall use the *SERAC* case as a template for analysis, given that this thesis is Africanist in outlook.

The communication in the *SERAC* case alleged a concerted violation of several of African Charter's rights by the Nigerian government and its multinational oil collaborators, which violations have caused environmental and health problems to Nigeria's Ogoni peoples.⁹⁵ The communication contended that Shell's exploitation of oil in Ogoniland had no regard for the health or environment of the local communities and that they regularly dispose toxic wastes into the environment and local waterways, in gross violation of applicable environmental standards.⁹⁶ The communication further asserted that the multinational oil corporation neglected to maintain its facilities, resulting in "numerous avoidable spills in the proximity of villages", which caused the contamination of water, soil, and air.⁹⁷ This contamination, in turn, allegedly created serious health problems, "including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems".⁹⁸

The Nigerian government, the petition continued, "neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry".⁹⁹ The communication alleged that "[d]espite the obvious health and environmental crisis in Ogoniland . . . the [Nigerian] Government [did] not require[...]"

⁹⁴ *Velazquez Rodriguez* case Judgment of 29 July 1988 Series C No 4.

⁹⁵ *SERAC* case (note 93 above) paras 1 & 43.

⁹⁶ Above, para 2.

⁹⁷ As above.

⁹⁸ As above.

⁹⁹ Above, para 4.

oil companies or its own agencies to produce basic health and environmental impact studies regarding hazardous operations and materials relating to oil production”.¹⁰⁰ It further stated that “the [Nigerian] Government [did] not require oil companies to consult oil-bearing communities before commencing operations, withh[e]ld information from these communities on the dangers created by oil activities,¹⁰¹ and . . . denied scientists and environmental organizations permission to enter Ogoniland”.¹⁰² The government, the communication further claimed, ignored concerns of Ogoni communities regarding oil development, and responded to protests with massive violence.¹⁰³ The communication alleged that the government placed “the legal and military powers of the State at the disposal of the oil companies” for “ruthless military operations”, including “wasting operations coupled with psychological tactics of displacement”.¹⁰⁴

In October 2001, the African Commission announced its decision in the *SERAC* case, finding for the plaintiffs and concluding that Nigeria had violated several provisions of the African Charter. In so doing, the Commission outlined the following typology of human rights obligations:

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights—both civil and political rights and social and economic—generate at least four levels of duties for a state that undertakes to adhere to a rights

¹⁰⁰ Above, para 5.

¹⁰¹ Above, para 4.

¹⁰² Above, para 5.

¹⁰³ Above, paras 3 & 8.

¹⁰⁴ As above.

regime, namely the duty to **respect, protect, promote, and fulfil these rights**. These obligations universally apply to all rights and entail a combination of negative and positive duties.¹⁰⁵

The remainder of this segment analysis this typology in comparative perspectives.

2.3.1 *The Obligation to Respect Human Rights*

The first level of obligation recognized in the *SERAC* case is the obligation to *respect* human rights. This obligation, which is analogous to the traditional obligation of non-interference,¹⁰⁶ forbids the State from acting in any way that would directly encroach upon recognized rights or freedoms. This obligation finds expression in the UN Charter, wherein Member States pledge themselves to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction.¹⁰⁷ This obligation entails that “[t]he state should respect right-holders, their freedoms, autonomy, resources, and liberty of their action”;¹⁰⁸ and a failure to ensure respect for human rights

¹⁰⁵ Above, para 44 (emphasis in the original).

¹⁰⁶ Van Hoof (note 92 above) 106.

¹⁰⁷ See UN Charter arts 55 & 56.

¹⁰⁸ *SERAC* case (note 93 above) para 45. Cf CESCR ‘The right to the highest attainable standard of health (article 12 of the ICESCR)’ General Comment 14 E/C12/2000/4 [hereinafter General Comment 14] para 33 (stating, with respect to the right to health, that “[t]he obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health”; italics in the original).

constitutes a violation of international law.¹⁰⁹ In considering whether a state has breached this obligation, it is immaterial that the state or its agents are not the violators.¹¹⁰

The obligation to respect human rights finds concrete expression in many aspects of socio-economic rights. The obligation involves, in relation to the right to food, recognizing the needs and realities of food production and refraining from taking measures that undermine food security. It prevents governments, in relation to housing, from engaging in any “practice, policy or legal measure” that infringes upon an individual’s freedom to use resources in a way that is appropriate to the satisfaction of the individual or, by extension, family, household, or community housing needs.¹¹¹ It also forbids governments from carrying out forced evictions without due process of law or providing alternative accommodation. It “implies that a government may not expropriate land from people for whom access to control over that land constitutes the only or main asset by which they satisfy their food needs, unless appropriate alternative measures are taken”.¹¹²

In cases where limitation or deprivation of the right to access to housing is unavoidable, the state must take steps to mitigate such interference by finding alternative accommodation for the evictees.¹¹³ A government violates human rights if it adopts a law

¹⁰⁹ *Avocats Sans Frontières ex rel Gaëtan Bwampamye v Burundi* Comm No 231/99 2000–2001 African Annual Activity Report Annex V para 31 (holding that a Burundian law “does not comply with the country’s treaty obligations emanating from its status as a State party to the African Charter”).

¹¹⁰ *Mouvement Burkinabé des Droits de l’Homme et des Peuples v Burkina Faso* Comm No 204/97 2000–2001 African Annual Activity Report Annex V para 42.

¹¹¹ *SERAC* case (note 93 above) para 61. Cf S Leckie ‘The Right to Housing’ in Y Ghai & J Cottrell (eds) *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (2004) 107 113.

¹¹² Van Hoof (note 92 above) 107.

¹¹³ See Brand ‘Introduction’ (note 83 above) 9–10.

or policy that allows poor peoples' homes to be demolished and replaced by luxury housing that the original inhabitants could not afford and without provision of alternative housing on reasonable terms.¹¹⁴ In the *SERAC* case, the African Commission similarly held that the state has a duty—

to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.¹¹⁵

Breaches of the right of access to housing, of course, occur regularly in Africa, a classic example being the 1990 Maroko episode in Nigeria's Lagos State. On 7 July 1990, the then military Governor of Lagos State, Colonel Rasaki, announced, through the media, that the Maroko settlement in Lagos would be demolished in 7 days. The government never served any quite notice on residents, as required by law; yet, from 14 to 25 July of that year, bulldozers razed down thousands of homes, destroying properties worth millions of Nigeria's naira. Armed soldiers protecting the demolition crew reportedly raped women who were trying to salvage the little they could of their belongings.¹¹⁶ The government provided grossly inadequate resettlement housing for the evacuees. Although it paid some compensation to the landowners, the government made

¹¹⁴ See Van Hoof (note 92 above) 107.

¹¹⁵ *SERAC* case (note 93 above) para 45.

no transfer plans for the over 10,000 students whose education was interrupted by the destruction of their schools in Maroko.¹¹⁷ Several years after, most of the evacuees are still squatting in various places in Lagos State, while Maroko itself has become a 'Paradise regained' and home to several affluent Nigerians, courtesy of the same government that forcefully dispossessed the poor from their homes. Some peoples' tragedies turned out to be other peoples' comedies.

The obligation to respect human rights entails, in relation to the right to health,

refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases.¹¹⁸

¹¹⁶ See Civil Liberties of Nigeria *Executive Lawlessness in the Babangida Regime* (1991) 13-14.

¹¹⁷ As above.

¹¹⁸ Above, para 34.

The obligation to respect human rights attaches to a state even under conditions of crisis. In *Commission Nationale des Droits de l'Homme et des Libertés v Chad*,¹¹⁹ the government of Chad tried to use the existence of a civil war as a defence for its violation of human rights. The Commission refused to accept this alibi, insisting, “the government has the responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders”.¹²⁰ The Commission found serious and massive violations of human rights, including failure of the government “to intervene to prevent the assassination and killing of specific individuals”. It stated, more importantly, that a civil war “cannot be used as an excuse by the [s]tate for violating or permitting violations of rights [declared] in the African Charter”;¹²¹ and this holding, it is submitted, applies to socio-economic rights as well.

The obligation to respect also compels states to remove any impediments that would prevent individuals from enjoying guaranteed rights. Foreclosing avenues of appeal to “competent national organs”, as the Nigerian Government did in *Constitutional Rights Project v Nigeria*,¹²² is a violation of the obligation to respect human rights, since such acts “increase[...] the risk that severe violations may go unredressed”.¹²³ Ouster clauses¹²⁴ are prohibited by the obligation to respect human rights. The African

¹¹⁹ *Commission Nationale des Droits de l'Homme et des Libertés v Chad* Comm No 74/92 1995–1996 African Annual Activity Report Annex VI.

¹²⁰ Above, para 22.

¹²¹ Above, para 21.

¹²² *Constitutional Rights Project v Nigeria* Comm No 60/91 1994–1995 African Annual Activity Report Annex VI (finding a violation of article 7(1)(a) of the Charter).

¹²³ Above, para 11.

¹²⁴ An ouster clause is a provision in an enactment, usually a military decree, that prohibits civil courts from having jurisdiction to consider acts taken, or purported to be taken, under the enactment. Decrees of this sort abounded during the military era in Nigeria.

Commission has found that denying citizens access to courts of their country through such clauses “create[s] a legal situation in which the judiciary can provide no check on the executive branch of government”¹²⁵ and makes citizens “highly vulnerable to violation of their rights”.¹²⁶ It further notes that a government that ousts a court’s jurisdiction on a broad scale “reflects a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and rule of law”.¹²⁷

The African Commission has also held that “[t]he right to enjoy the best attainable state of physical and mental health . . . in Article 16(1) of the Charter and the right to a general satisfactory environment favourable to development” in Article 16(3) precludes governments from directly threatening the health and environment of their citizens”.¹²⁸ In sum, states must refrain from “carrying out, sponsoring or tolerating any practice, policy or legal measure[...] violating the integrity of the individual”.¹²⁹ Such interpretations have far-reaching implications for a country like Nigeria, which, for many years, excused its abrogation of group rights by relying upon the domanial theory of land ownership.¹³⁰ Sadly, majority of African states may not respond positively to progressive pronouncements such as those in *SERAC*, given the legislative and other measures that

¹²⁵ *Constitutional Rights Project v Nigeria* Comm Nos 140/94 141/94 145/95 1999-2000 African Annual Activity Report Annex V para 41.

¹²⁶ *Constitutional Rights Project v Nigeria* Comm No 102/93 1998-1999 African Annual Activity Report Annex V para 33.

¹²⁷ Above para 81.

¹²⁸ *SERAC* case (note 93 above) para 52.

¹²⁹ Above.

¹³⁰ The Nigerian Constitution provides that “the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly”. Nigerian Constitution 1999 sec 44(3).

are required to give effect to them. Even local courts are increasingly reluctant to make far-reaching pronouncements on group rights.

2.3.2 *The Obligation to Protect Human Rights*

The obligation to *protect* is a positive duty that requires a state to “take measures to protect beneficiaries of the protected rights against all political, economic and social interferences”.¹³¹ This obligation applies to all human rights.¹³² It is an obligation of due diligence and not of result, entailing no more than taking “reasonable and appropriate measures”,¹³³ since human rights law must not place an impossible or disproportionate burden on the authorities.¹³⁴ The prohibition of torture, for example, requires states “to take preventive measures such as stopping secret detentions, the search for effective solutions in a transparent legal system and continuation of investigations of allegations of torture”.¹³⁵ Thus, the obligation to protect demands “an aggregate pattern of social interactions in which all individuals and groups are protected in the utmost freedom of choice and subjected to the least possible coercion, governmental or private”.¹³⁶

¹³¹ See *SERAC* case (note 93 above) para 46. Cf ICCPR (note 22 above) art 6(1) (providing that the inherent right to life “shall be protected by law”).

¹³² See CESCR General Comment 3 (note 15 above) para 8.

¹³³ See *William Eduardo Delgado Páez v Colombia* Communication 195/85 UN GAOR Human Rights Commission 39th Sess Supp No 40 at 43 para 5.6 UN Doc A/45/40 (1990) Annex IX sect D 43-49 reprinted in 1990 HRLJ 313 para 5(5); *Plattform “Ärzte für das Leben” v Austria* 139 Eur Ct HR (ser A) para 34 (1988). Cf *Joaquín David Herrera Rubio et al v Colombia* Communication No 161/1983 2 Nov 1987 UN GAOR Human Rights Commission at 192 para 10(3) UN Doc CCPR/C/OP/2 (1990) (requiring “effective measures”).

¹³⁴ See *Osman v UK* 1998-VIII Eur Ct HR 3124.

¹³⁵ *The Law Office of Ghazi Suleiman v Sudan* Comm Nos 222/98 229/99 2002-2003 African Annual Activity Report Annex VII [hereinafter *Suleiman v Sudan*] para 46.

¹³⁶ MS McDougal *et al* *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980) 7.

The African Commission held that the obligation to protect human rights also requires a state to create and maintain an atmosphere or framework conducive to the effective interplay of laws and regulations, “so that individuals will be able to freely realize their rights and freedoms”.¹³⁷ The rationale for this positive obligation is that human rights are better protected where appropriate laws and administrative policies are supported by equally appropriate governmental machinery—courts, police, and penal institutions—as well as a system of health, social, and educational services.¹³⁸ Without the provision of these and other structures to enable individuals to redress violations, the state fails in its obligation to protect human rights.¹³⁹

A perplexing question is whether a state’s obligation to protect human rights includes the duty to enact domestic laws to protect the human rights of individuals within the state’s jurisdiction from *all* violations. Is a state obliged to provide effective remedy for human rights violations committed by private entities in addition to those committed by the state itself? Is it obliged to take steps to prevent others within its jurisdiction from violating human rights? Should a state enact a law to prevent employers from dismissing employees who engage in trade union activities simply because it is bound by treaty to respect “freedom of association”?¹⁴⁰

Publicists and international case law answer these questions in the affirmative. According to Van Hoof, “[t]he obligation to protect goes further, in the sense that it

¹³⁷ *SERAC* case (note 93 above) para 46.

¹³⁸ See Z Stavrinides ‘Human Rights Obligations under the United Nations Charter’ (1999) 3 *International Journal of Human Rights* 38 45–46.

¹³⁹ See *Jawara v The Gambia* Comm Nos 147/95 149/96 1999–2000 African Annual Activity Report Annex V [hereinafter *Jawara v Gambia*] para 74.

¹⁴⁰ See Sieghart (note 26 above) 43.

forces the State to take steps—through legislation or otherwise—which prevent or prohibit others (third persons) from violating recognized rights and freedoms”.¹⁴¹ The basis for taking this position, which I subscribe, is that a state’s human rights responsibility extends to everything within its jurisdiction, and jurisdiction is the ambit of a state’s “judicial, legislative, and administrative competence” and extends, as a minimum, to the state territory.¹⁴²

The African Commission takes a similar position. In *Commission Nationale des Droits de l’Homme et des Libertés v Chad*,¹⁴³ several people were directly and indirectly harassed and arbitrarily arrested by members of the security services. The Commission held: “Even where it cannot be proved that violations were committed by government agents, the government [has] a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders”.¹⁴⁴ In *Amnesty International v Sudan*, the petitioners alleged that “prisoners were executed after summary and arbitrary trials and that unarmed civilians were also victims of extra-judicial executions”.¹⁴⁵ The African Commission stated: “Even if Sudan is going through a civil war, civilians in areas of strife are especially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law”.¹⁴⁶

¹⁴¹ Van Hoof (note 92 above) 106.

¹⁴² Brownlie *Principles of Public International Law* (note 8 above) 301.

¹⁴³ *Commission Nationale des Droits de l’Homme et des Libertés v Chad* Comm No 74/92 1995-1996 African Annual Activity Report Annex VI.

¹⁴⁴ Above, para 22. Cf *SERAC* case (note 93 above) para 57.

¹⁴⁵ *Amnesty International v Sudan* Comm Nos 48/90 50/91 52/91 89/93 1999-2000 African Annual Activity Report Annex V [hereinafter *Amnesty International v Sudan*] para 48.

¹⁴⁶ Above, para 50.

In the realm of socio-economic right to food, the obligation to protect includes preventing distortions and developing protective legislation.¹⁴⁷ For the right to health, it entails regulating private health care provisions to protect citizens against exploitation by private institutions and providing effective remedy where such exploitation occurs.¹⁴⁸ For the right to work, it entails regulating and monitoring the treatment of workers by their employees. And for the right to environment, it involves taking measures that enable local populations confronted with harmful corporate activities to make informed decisions and to have their voices heard. The African Commission elaborates this “process rights” obligation thus (in the context of multinational oil activities):

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.¹⁴⁹

¹⁴⁷ See J Cottrell & Y Ghai ‘The Role of the Courts in the Protection of Economic, Social & Cultural Rights’ in *Economic, Social & Cultural Rights in Practice* (note 111 above) 58 64 (referencing A Eide *Right to Adequate Food as a Human Right* (1989)).

¹⁴⁸ See Brand ‘Introduction’ (note 83 above) 10. Cf CESCR General Comment 14 (note 108 above) para 33 (“The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees” (italics in the original)).

¹⁴⁹ *SERAC* case (note 93 above) para 53.

It could even be argued that this responsibility to protect applies diagonally. A state may be required to take reasonable protective measures against its non-state actors operating in another state especially where the host state is incapable or unwilling to prevent the human rights abuses itself.¹⁵⁰

In sum, a state's culpability for human rights violations extends to all individuals and entities within its jurisdiction, and the duty of protection requires states to ensure that their laws render illegal any conduct that would be in breach of the treaty, whether or not the conduct is committed by the government or by a private entity.¹⁵¹

2.3.3 *The Obligation to Promote Human Rights*

The obligation to *promote* human rights requires a state to ensure that individuals are able to exercise their rights and freedoms. Although Van Hoof believes that this obligation “concerns more or less vaguely formulated goals, which can only be achieved progressively in the long term”,¹⁵² the African Commission stresses that the obligation involves “promoting tolerance, raising awareness, and even building infrastructures”.¹⁵³ This makes particularly good sense in a Continent as Africa, where the state largely controls the means of internal communications. Without such a positive obligation, the state might be unwilling to undertake the substantial investment involved in informing a

¹⁵⁰ See JA Hessbruegge ‘Human Rights Violations Arising from Conduct of Non-State Actors’ (2005) 11 *Buffalo Human Rights Law Review* 21 83 (arguing, “a developed state might have to take reasonable measures to prevent one of its transnational corporations from engaging in human rights infringing conduct in a developing state, if that developing state lacks the power, technical expertise or political will to fulfill its own diagonal obligations to protect”). Cf M Sornarajah ‘Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States’ in C Scott (ed) *Torture as Tort* (2001) 491.

¹⁵¹ See *Young James & Webster v United Kingdom* (1981) 4 EHRR 38 para 49.

¹⁵² Van Hoof (note 92 above) 106.

¹⁵³ *SERAC* case (note 93 above) para 46.

largely illiterate population of human rights guarantees and obligations entailed therein. This obligation extends to administrative bodies, which must promote the realization of socio-economic rights.¹⁵⁴

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁵⁵ exhibits an obligation to promote that includes achieving a number of socio-economic rights. It commands the state to modify or transform existing cultural patterns and underlying beliefs. It makes detailed prescriptions in fields like education, employment, rural life, and family life. The African Commission, in its many resolutions and recommendations, has emphasized the importance of the promotional obligation and has encouraged states to take action accordingly. Noting that “ignorance is the main obstacle to [...] respect for human and peoples’ rights” in Africa, the Commission has recommended that State Parties should “introduce the teaching of human and peoples’ rights at all levels of their educational systems . . . [and should] periodically broadcast, with the help of the African Commission . . . radio and television programmes on human rights in Africa”.¹⁵⁶

A state also promotes human rights through the reporting system, though, as Chapter One indicated, many State Parties are unfaithful in fulfilling this simple obligation.

¹⁵⁴ See G Budlender ‘Justiciability of Socio-economic Rights: Some South African Experiences’ in *Economic, Social & Cultural Rights in Practice* (note 111 above) 33 37.

¹⁵⁵ Convention on the Elimination of All Forms of Discrimination Against Women opened for signature 1 Mar 1980 27 UST 1909 TIAS No 8289 1249 UNTS 14 [hereinafter CEDAW].

¹⁵⁶ Modalities for Human Rights Promotion (note 63 above) 13.

2.3.4 *The Obligation to Fulfil Human Rights*

The last layer of the *SERAC* obligations—the obligation to *fulfil*—is “a positive expectation” that the Member State will “move its machinery towards the actual realisation of the rights”.¹⁵⁷ It requires the State, in the wordings of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,¹⁵⁸ “to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights”.¹⁵⁹

This obligation “is . . . very much intertwined with the duty to promote” human rights,¹⁶⁰ requiring “more far-reaching measures on the part of the government in that it has to actively create conditions aimed at the achievement of a certain result in the form of a (more) effective realization of recognized rights and freedoms”.¹⁶¹ In relation to the right to health, for example, the CESCR has held that fulfilment incorporates promotion, given the critical importance of health promotion in the work of the World Health Organisation (WHO) and others.¹⁶² In relation to the right to food, this obligation entails incorporating aspects of food culture into development, establishing food control mechanisms, and formulating policies.

¹⁵⁷ *SERAC* case (note 93 above) para 47. Cf CESCR General Comment 14 (note 108 above) para 33 (stating, “the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health”; italics in the original).

¹⁵⁸ ‘The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 *Human Rights Quarterly* 691 693–94.

¹⁵⁹ *SERAC* case (note 93 above) para 6.

¹⁶⁰ Above. Cf Van Hoof (note 92 above) 106 (“The obligation to ensure and the obligation to promote together encompass, *inter alia*, what traditionally are called ‘programmatic’ obligations within the framework of economic, social and cultural rights”); Brand ‘Introduction’ (note 83 above) 10 (“*The duty to promote* is difficult to distinguish from the duty to fulfil”; italics in the original).

¹⁶¹ Van Hoof (note 92 above) 106.

¹⁶² CESCR General Comment 14 (note 108 above) para 33 n 23.

The obligation to fulfil human rights also incorporates the obligation to *facilitate* and *provide* resources and services necessary for human rights. In order to secure the right to a fair trial, a state must provide counsel for an impecunious individual who otherwise would not be able to retain counsel for his defence in a criminal trial. Such examples again underscore the point made in Chapter One, as reinforced by Shue, that it is more fruitful to examine the relatively negative, positive, and the intermediate elements that are mixed in various proportions in the implementation of just about every right, rather than engage in “the artificial, simplistic, and arid exercise of attempting to classify every right as flatly either negative or positive”.¹⁶³

In practice, the African Commission gives a broad interpretation to the African Charter *vis-à-vis* states’ obligations to fulfil human rights. The Commission has found that the Charter’s guarantee of the right to a healthy environment or “a general satisfactory environment”¹⁶⁴ imposes a number of “clear obligations upon a government”.¹⁶⁵ It “requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources ...”.¹⁶⁶ Compliance with the spirit of their obligation, including the requirement to “take the necessary measures to protect the health of their people and to ensure that they receive medical

¹⁶³ Shue ‘The Interdependence of Duties’ (note 3 above) 84. Cf Van Hoof (note 92 above) 107 (arguing that the typology herein examined “stresses the unity between civil and political rights, and economic, social and cultural rights, as long as it is recognized that the various ‘layers’ of obligations can be found in each separate right or freedom”).

¹⁶⁴ African Charter (note 14 above) art 24.

¹⁶⁵ *SERAC* case (note 93 above) para 52.

¹⁶⁶ Above.

attention when they are sick”,¹⁶⁷ demands that states periodically arrange for independent scientific monitoring of threatened environments. Governments themselves must undertake environmental and social impact assessments prior to major industrial developments and must publicize such studies. In the case of projects undertaken by third parties, governments must monitor and provide information to communities exposed to hazardous materials and activities, while also offering meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.¹⁶⁸

Municipal courts, however, have held that the fulfilment of certain human rights provisions is contingent upon the availability of resources for such purposes, despite the sweeping extensions of the fulfilment obligation. In *Soobramoney v Minister of Health, KwaZulu-Natal*,¹⁶⁹ the South African Constitutional Court considered section 27(3) of the South African Constitution—providing for the right to emergency medical treatment—and maintained that the appellant’s case must be analysed in the context of available resources to the health services and the needs the health services had to meet.¹⁷⁰ In *Government of the Republic of South Africa v Grootboom & Ors*,¹⁷¹ the Constitutional Court, relying on *Soobramoney*, held that part of the State’s positive obligations imposed by section 26(2) (relating to housing) is to devise a comprehensive and workable plan for meeting them. This obligation is not absolute, but involves taking “reasonable legislative

¹⁶⁷ African Charter (note 14 above) art 16.

¹⁶⁸ *SERAC* case (note 93 above) para 53.

¹⁶⁹ See *Soobramoney v Minister of Health KwaZulu-Natal* 1998 (1) SALR 765 (CC).

¹⁷⁰ Above, para 11.

and other measures ... to achieve the progressive realisation of the right ... within available resources.”¹⁷² Progressive realization means making housing accessible not only to a larger number of people over time, but to a wider range as well. Availability of resources is an important factor in determining reasonableness.

2.4 Progressive Realization and the ‘Minimum Core’ Obligations

As earlier stated, every state party to an international human rights treaty is expected to keep faith with the sacred principle *pacta sunt servanda*. Often, states are willing to perform their human rights obligations, but they are unable; otherwise stated, the ‘spirit’ may be willing, but the ‘flesh’ is often weak. Genuine limitations sometimes confront states, making it difficult for them to implement socio-economic rights.¹⁷³ This realism probably explains why architects of most instruments guaranteeing socio-economic rights hardly intend their provisions to create individual rights on demand. During the elaboration of the South African Bill of Rights, the Ad Hoc Committee for the Campaign on Social and Economic Rights stressed the same point in its submission to the South African Constitutional Assembly (CA):

Social and economic rights do not have as their only or primary remedy the provision of a commodity on demand. Rather, they require the creation of an

¹⁷¹ *Government of the Republic of South Africa v Grootboom & Ors* [2000] 11 BCLR 1169 (CC) [hereinafter *Grootboom* case].

¹⁷² Above, para 38.

¹⁷³ Cf CESCR General Comment 14 (note 108 above) para 5 (wherein the CESCR acknowledged “the formidable structural and other obstacles resulting from international and other factors beyond the control of States that impede the full realization” of the right to health in article 12 of the ICESCR).

environment and processes which enable individuals and communities to realize these rights . . . [T]he experience of people working with poor communities, both here and in other jurisdictions, has been that these communities realize that the constitutional entrenchment of social and economic rights will not necessarily translate into the immediate provision of material goods.¹⁷⁴

This tension between desire and fulfilment led to the development of minimum core obligations on socio-economic rights. This segment examines the essence and constituents of the “minimum core”, which is an important exercise given that a violation may consist of acts of commission of human wrongs or the omission to fulfil the minimum essentials for the enjoyment of rights.

2.4.1 The Essence of the ‘Minimum Core’

Every State Party to human rights instruments guaranteeing socio-economic rights is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of these rights.¹⁷⁵ The essence of the minimum core is to bridge the gap between fundamental entitlements and scarce resources.¹⁷⁶ The law does not expect a government to spend resources that it does not have or to spend all of its resources on satisfying only socio-economic rights, given other competing demands. One does not need to be an economist to know that resources available to a particular society are

¹⁷⁴ Ad Hoc Committee for the Campaign on Social and Economic Rights Submission 16 May 1995 4 available at <http://constitution.uct.ac.za/cgi-bin/catdoc/sh/cama/data/data/subs/4652.doc>.

¹⁷⁵ See *Grootboom* case (note 171 above) para 30.

¹⁷⁶ S Russell ‘Minimum State Obligations: International Dimensions’ in D Brand & S Russell (eds) *Exploring the Core Content of Socio-economic Rights: South African and International Perspectives* (2002) 11 14.

limited whereas demands are unlimited. A state, thus, has a margin of discretion in selecting what means to implement its human rights obligations. However, such discretion does not extend to a refusal to fulfil these obligations, since that would undermine the *raison d'être* of the treaty obligations altogether.

The minimum core, thus, is the 'lowest common multiple' (LCM) below which a state cannot descend, "the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation".¹⁷⁷ As Friedman writes:

States in which large segments of the population are denied effective access to education, basic health services, nutrition, housing, and safe drinking water are States in which not even the minimal essential levels of economic and social rights are satisfied. These States are not meeting their minimum core obligations under international law.¹⁷⁸

The CESCR also explained the principle in its General Comment 3 thus:

On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligations to ensure the satisfaction of, at the very least, minimum essential levels of each of the

¹⁷⁷ Cf *Grootboom* case (note 171 above) para 31.

¹⁷⁸ EA Friedman 'Debt Relief in 1999: Only One Step on a Long Journey' (2000) 3 *Yale Human Rights and Development Law Journal* 191 197. Cf *Grootboom* case (note 171 above) para 30 ("[A] state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima facie* in breach of its obligations under the Covenant").

rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps “to the maximum of its available resources”.¹⁷⁹

It is, however, not enough for a state to attribute its failure to meet its minimum core obligations to lack of resources. To plead that alibi, a state must demonstrate that it has made every effort to use all its available resources to satisfy the minimum core of socio-economic rights.¹⁸⁰

2.4.2 *Constituents of the ‘Minimum Core’*

Each socio-economic right has a “minimum essential level” which a state must satisfy, but the CESCR does not specify this minimum. The starting point might be to examine the ICESCR itself, which, in several ways, goes beyond the bare articulation of rights and clarifies the mandate of states for the progressive achievements. The ICESCR spells out a

¹⁷⁹ CESCR General Comment 3 (note 15 above) para 10.

¹⁸⁰ As above.

mini program and some elements of a time schedule. Articles 13(2) and (14), for example, provide for the sequential realization of free education in ways that establish priorities such as free and compulsory primary education. The South African Constitution follows this pattern in its guarantee on education. It provides, *inter alia*, “Everyone has the right— (a) to a basic education, including adult basic education, and (d) to further education, which the state, through reasonable measures, must make progressively available and accessible.”¹⁸¹ This also entails, in the particular context of South Africa, that children are not taught in a racist, homophobic or otherwise discriminatory manner.

Are courts competent to determine the minimum core? The South African Constitutional Court answered this question in the affirmative in the *Grootboom* case, though it created some uncertainties in *Minister of Health v Treatment Action Campaign*.¹⁸² In the *Grootboom* case, the Constitutional Court adopted the CESCR’s position that socio-economic rights inherently include a preference for the poorest and most disadvantaged in society. It held that the minimum core obligation “is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question”.¹⁸³ Using the right of access to adequate housing as a template for analysis, the Court stated that the minimum core—

requires more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself. For a person to have access to

¹⁸¹ Constitution of South Africa sec 29(1).

¹⁸² See *Minister of Health v Treatment Action Campaign* [2002] 5 SALR 721 (CC) [hereinafter TAC].

adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling.¹⁸⁴

Determining the minimum threshold for the progressive realisation of the right of access to adequate housing requires identifying the needs and opportunities for enjoyment of the right. This, in turn, varies “according to factors such as income, unemployment, availability of land and poverty”¹⁸⁵ and depends on the economic and social history and circumstances of each country.¹⁸⁶

In the context of the right of access to housing, and probably of other rights, the Constitutional Court has stated that the reasonableness of measures taken by a state is “the real question”, in view of the diversity of needs and, hence, the difficulty of determining the minimum core.¹⁸⁷ In general, “[i]ssues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention”.¹⁸⁸ Thus, the state must provide social assistance for those who cannot afford to pay for housing, which is the link between the right to housing and the other socio-economic rights.¹⁸⁹

¹⁸³ *Grootboom* case (note 171 above) para 31.

¹⁸⁴ Above, para 35.

¹⁸⁵ Above, para. 32.

¹⁸⁶ As above.

¹⁸⁷ As above, para 33 (stressing: “there are those who need land; others need both land and houses; yet others need financial assistance”). Above.

¹⁸⁸ Above, para 36

¹⁸⁹ As above (linking section 26 with 27 of the Bill of Rights).

In the *TAC* case, the Court questioned courts' institutional competency to determine the constituents of a minimum core obligation, even for evaluating the reasonableness of government policies. Courts, it asserts, are ill equipped "to make the wide-ranging factual and political enquiries necessary for determining ... the minimum-core standards."¹⁹⁰ A synthesis could be attempted, which is that a court may not be able to undertake the required factual and political inquiries necessary to establish the factual predicate of a minimum core obligation, unless it is presented with sufficient information.

International assistance is sometimes required in order to fulfil the 'minimum core, and African states should not be ashamed in seeking such assistance through development aid. It is the law of the natural universe that no one can exist or survive solely on his own resources; everyone, everything, is indebted to everyone and everything else. The CESCR has stated, with regards to the right to food, that: "A state claiming that it is unable to carry out its obligations for reasons beyond its control therefore has the burden of providing that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food".¹⁹¹

2.5 Conclusion

The protection of human rights depends on states' commitments and continued willingness to honour their obligations as enshrined in the various human rights

¹⁹⁰ Above para 37. Other practical difficulties in articulating the minimum core include the fact that different people need different levels of protection for a particular socio-economic right to be meaningful for them. See E Berger 'The Right to Education under the South African Constitution' (2003) 103 *Columbia Law Review* 614 632 n 104.

¹⁹¹ CESCR 'The Right to Adequate Food (Article 11)' General Comments 12 E/C12/1999/5 12 May 1999 [hereinafter General Comments 12] para 17.

instruments. As indicated in Chapter One, African states do not seem prepared to go far enough in honouring their various obligations. Their ratification of universal instruments and subsequent adoption of regional human rights treaties indicate formal commitments to finding bold solutions to human rights problems, but their reluctance to follow through on the implementation of these rights indicts and severely undermines their so-called commitments to human security. This reluctance is ill founded, given that “the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law”.¹⁹² Respect for human rights improves the conditions of those under a state’s jurisdiction, engenders their confidence in governance,¹⁹³ and lightens the heavy burden of institutions charged with implementing human rights norms.

Classifying States’ obligations into negative and positive is a difference without a distinction. It is actually dishonest for a state to pick and choose among rights that it will honour and to interpret others as optional, dispensable, non-obligatory, or even “unreal.” Non-consequentialist libertarianism is patently problematic, since most human rights are interrelated and cover different aspects of the same basic concerns—integrity, freedom, and equality of all human beings.¹⁹⁴ Negative duties, which imply non-interference in the enjoyment of rights, are essential parts of freedom and of non-infliction of suffering. Construing them as the sole conceptions of rights leads to a society “consisting of atomized, mutually disregarding, alienated individuals with no positive consideration for cooperation in helping to fulfil one another’s needs or interests or for rectifying the

¹⁹² *Amnesty Int’l v Sudan* Communication No 48/90 para 79.

¹⁹³ Cf *Constitutional Rights Project v Nigeria* Communication No 102/93 para 58 (holding that “general restrictions on rights diminish public confidence in the rule of law and are often counter-productive”).

¹⁹⁴ See A Eide ‘Economic, Social and Cultural Rights as Human Rights’ in A Eide C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (1995) 21 22.

extreme inequalities of wealth and power that characterise most societies”.¹⁹⁵ A *contrario*, construing rights integratively leads to a society where men and women are equally able to maximise their potentials.¹⁹⁶

Socio-economic rights are both normative and obligatory; they are negative and positive, entailing duties of non-interference in certain contexts and active assistance by respondents in vitally important economic and social contexts. Given the substantial benefits of recognizing all human rights, African states will eventually realize that there is no better alternative to respecting, protecting, promoting, and fulfilling these rights.

¹⁹⁵ A Gewirth *The Community of Rights* (1996) 31-2.

¹⁹⁶ See *Grootboom* case (note 171 above) para 23.

Chapter Three

THE AFRICAN STATE AND CHALLENGES OF SOCIO-ECONOMIC RIGHTS

3.1 Introduction

Post-colonial African states have striven to fashion themselves in the image of Western democracy and liberalism with very little success. Too frequently, they succumb to authoritarian, usually military or one-party, rule.¹ As Kaplan rightly observed: “Tyranny is nothing new in Sierra Leone or in the rest of West Africa. But it is now part of an increasing lawlessness that is far more significant than any coup, rebel insurrection, or episodic experiment in democracy”.² This gyration between democracy and authoritarianism has left most states in deep turmoil, with no significant improvement in the welfare of their citizens.³ Authoritarianism and other pathologies—for example, massive corruption, clientelism, and institutional collapse—are manifestations of incomplete state formations in Africa.

¹ On problems associated with post-colonial states in Africa, see, in general, C Clapham *Africa and the International System: The Politics of State Survival* (1996); B Davidson *The Blackman's Burden: Africa and the Curse of the Nation-State* (1992); N Chazan ‘State and Society in Africa: Images and Challenges’ in D Rothchild & N Chazan (eds) *The Precarious Balance: State & Society in Africa* (1988) [hereinafter *The Precarious Balance*] 325 (discussing the state's problems, societal happenings, political changes, and the challenges faced by the states and society in Africa); and TM Callaghy ‘The State as Lame Leviathan: The Patrimonial Administrative State in Africa’ in Z Ergas (ed) *The African State in Transition* (1987) 87.

² RD Kaplan ‘The Coming Anarchy’ in RD Kaplan *The Coming Anarchy: Shattering the Dreams of the Post-Cold War* (2000) 3 4.

Few governments, perhaps Ghana, South Africa, Botswana, Mauritius, and Senegal, are admittedly labouring under difficult circumstances to improve the welfare of their people, but these are few good apples amid a barrel of bad ones. Most states in Africa suffer from arrested development. Many states have failed or are failing,⁴ among them Sierra Leone, Liberia, Burundi, Sudan, Nigeria, and the Democratic Republic of Congo. A few others have descended into complete anarchy—the condition of a society without a government. This is the case with Somalia, where sovereign power has been transferred to warlords, “unrestricted by political institutions or a social order”.⁵ Indeed, Somalia has had no bilateral and multilateral relations for close to two decades. All foreign diplomatic missions in Mogadishu have been closed down and the country has no functional embassy abroad. It has not presented its annual credentials to the United Nations (UN) for over a decade and has also not participated in any UN General Assembly vote since 1993.⁶

³ See O Oko ‘Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa’ (2000) 33 *Vanderbilt Journal of Transnational Law* (2000) 575 577.

⁴ State failure occurs when the authority is “unable to provide the most fundamental services that make up the state’s obligations in its contract with society”. See BN Dunlap ‘State Failure and the Use of Force in the Age of Global Terror’ (2004) 27 *Boston College International & Comparative Law Review* 453 458 (identifying the services that a failed state is unable to provide as physical security, basic health care, education, transportation and communications infrastructure, monetary and banking systems, and a system for resolving disputes). See also IW Zartman ‘Introduction: Posing the Problem of State Collapse’ in IW Zartman (ed) *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (1995) 1 (distinguishing between state collapse and anarchy and stressing that state collapse leads to ethnic nationalism as the residual, viable identity); see also G Kreijen *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (2004) 101 (noting that a failed state “lacks the ability to exert its rights, while the international community generally is unable to extract any obligations. Responsibility as a core notion of international law seems to be rendered obsolete. Failed States appear to escape the normative character of international law”).

⁵ J Chopra ‘Achilles’ Heel in Somalia: Learning from a Conceptual Failure’ (1996) 31 *Texas International Law Journal* 495 507 (continuing: “In an institutional vacuum, the factions were poised for mutual destruction in an unprecedented chaotic anarchy”).

⁶ See eg Reports of the UN Credentials Committee UN Docs A/46/563 (1991) A/47/517 (1992) A/48/512 (1993) A/49/517 (1994) A/50/559 (1995) A/52/719 (1997) and A/53/556 (1998). See also Kreijen (note 4 above) 71 (referencing the Bureau of International Organisation Affairs US Department of State 1998 Voting Practices of the UN Report to Congress submitted Pursuant to Public Law 101-67, which designates Somalia as a “non-participating UN member”); see also, in

This Chapter examines the effects of imperfect state formations and external dependency on the advancement of socio-economic rights in Africa. This inquiry is a necessary compliment to earlier chapters, but it is also central to this thesis. A state is not simply an inert abstraction, but “a collective agent of macropolitical process”.⁷ Its ability to deliver economic and social goods depends largely on the historicity of its formation and the imperatives that govern its behaviour. The Chapter will interrogate four major challenges: weak post-colonial states and institutions, unremitting conflicts, corruption and mismanagement of scarce resources, and the crisis of development under an unfair international economic order (IEO). It is important to emphasise that post-colonial state formations do not account for all human rights abuses in Africa. The Chapter will reflect on measures necessary to overcome these fault lines in order to advance human security in Africa. I argue, more especially, for entrenchment of democracy and good governance in theory and practice, since socio-economic rights often have broader enjoyment in democratic societies.⁸ Africa will need no foreign aid if its governments remove corruption and channel resources towards economic development rather than spending on acquisition of weapons of “mass destruction” and other white elephant projects.

3.2 The State Structure in Africa

general, GB Helman & SR Ratner ‘Saving Failed States’ (1992-3) 89 *Foreign Policy* 3 (dealing with state collapse in Somalia).

⁷ C Young ‘The African Colonial State and Its Political Legacy’ in *The Precarious Balance* (note 1 above) 25 29.

⁸ Cf A Sen *Development as Freedom* (1999) 178 (noting “that there has never been a famine in a functioning multiparty democracy”).

Many endogenous and exogenous factors are responsible for Africa's failure to meet human security. This segment examines these factors, as necessary steps towards feasible and effective prescriptions.

3.2.1 *Weak Post-colonial States and Institutions*

Advancing *all* human rights depends on effective institutions: an independent judiciary, functional and efficient ministries and units for civil service delivery, good labour relations, functional units for health-care deliveries and educational administrations, *et cetera*. A vibrant, independent, media is also necessary to promote human rights through education and expose their abuses through reporting. In Africa, most, certainly not all, of these institutions have failed to deliver, due to structural weaknesses inherent in post-colonial states. Some states have exhibited greater weaknesses than others, but most share a common heritage of colonialism and all depend on the global economic system.⁹

Classical international law enumerates a permanent population, defined territory, government, and independence or the capacity to enter into relations as the criteria of statehood.¹⁰ Brownlie adds other criteria, such as permanence, willingness to observe international law, a certain degree of civilization, and sovereignty.¹¹ Recognition constitutes the acknowledgement of the satisfactory fulfilment of these criteria—an

⁹ See V Azarya 'Reordering State-Society Relations: Incorporation and Disengagement' in D Rothchild and N Chazan (eds) *The Precarious Balance* (note 1 above) 3 4.

¹⁰ See Montevideo Convention on Rights and Duties of States signed on 26 Dec 1933 art 1 (1934) 28 *American Journal of International Law* 75.

¹¹ I Brownlie *Principles of Public International Law* (1998) 70–77.

essentially empirical test¹²—although state practice does not show a uniform and consistent pattern in relation to their application.¹³ The government of this “modern state” usually comprises three independent organs—the legislature, the executive, and the judiciary—functioning within a territory that is unambiguously defined.¹⁴ The Western system also presumes that a state will have a fully functioning civil society and a free press, with “organic” constitutions grounded on the soil and clearly defining the powers, rights, and responsibilities of all participants. Other criteria include the protection of human rights, meaning, “an entity unwilling or unable to respect human rights, especially the right to self-determination, should be barred from statehood”.¹⁵

A cursory reflection shows that African and Western states are superficially similar but fundamentally different on most of the above criteria. African states absorbed certain Western values, through indirect rule, assimilation policy and other devices, but they lack the empirical and institutional features of statehood.¹⁶ A typical African state evolved from the thesis of colonialism and the anti-thesis of nationalism, producing a synthesis of “nation-statism [that] looked like a liberation”.¹⁷ Colonialism was “the cradle of contemporary forms of fragmentation in Africa”, weaved “from the material that the pre-

¹² See Kreijen (note 4 above) 109. See, in general, CJR Dugard *Recognition and the United Nations* (1987); and J Crawford *The Creation of States in International Law* (1979).

¹³ Kreijen (note 4 above) 18 (noting that claims of statehood have to be judged in the light of the particular circumstances).

¹⁴ See J Ojwang ‘Legal Transplantation: Rethinking the Role and Significance of Western Law in Africa’ in Peter Sack & Elizabeth Minchin (eds) *Legal Pluralism: Proceedings of the Canberra Law Workshop VII* 99 (1986). Cf Brownlie *Principles of Public International Law* (note 11 above) 71 (writing that “the existence of effective government, with centralized administrative and legislative organs, is the best evidence of a stable political community.”).

¹⁵ Kreijen (note 4 above) 23 (citing in support of this criterion, the demand of the then European Community that respect for certain human rights was a precondition for the recognition of the claims to independence of the states that disintegrated from the former Soviet empire). Above, 24.

¹⁶ Above, 1-2 (“[T]he legal revolution that facilitated the decolonization of sub-Saharan Africa emphasized the juridical elements of statehood, while neglecting the empirical element”).

existing, pre-colonial sets of identities and relationships” provided.¹⁸ The colonial state displaced various pre-colonial formations, such that what today is called Africa is primarily what Europeans decided it was.¹⁹

Colonialism left no valid structures for the future or for the immediate advancement of human rights. It built, instead, empty shells of representational politics erected on foundations of oppressive and alienating states.²⁰ Colonialism, by its very nature, could not build institutions of statehood in Africa; it was not intended to. It constituted a historic disruption of the normal evolutionary process, with the old order shattered together with most of its binding institutions. In some places, colonialists tried to reinvent the wheel; in other places, their intervention constituted a truly revolutionary restructuring of the political process. The result of these anomalies is that African states are more relevant internationally, but they are not domestically “authorised and empowered”.²¹ They remain deficient in the legitimate exercise of coercion within their boundaries; in financial self-sufficiency; in leadership of national political communities; and in the provision of basic services.

¹⁷ Davidson (note 1 above) 10.

¹⁸ See OC Okafor *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (2000) 98. Cf NKA Busia Jr ‘The Status of Human Rights in Pre-Colonial Africa’ in E McCarty-Arnolds *et al* (eds) *Africa, Human Rights, and the Global System: The Political Economy of Human Rights in a Changing World* (1994) 226 (asserting that “the human rights performance of contemporary African States must essentially be traced to the structure and social forces of pre-colonial African society”).

¹⁹ See AA Mazrui *The Africans: A Triple Heritage* (1986) 101. Cf M Mamdani *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) 287 (arguing that Europe did not bring a tropical version of the late nineteenth century nation-state but created multicultural and multiethnic states in Africa).

²⁰ See TA Aina ‘Reflections on Democracy and Human Rights’ *African Topics* Jan–Mar 2000 30 (arguing also that the institutions erected by colonialism had no real roots in the society in which they operated and that even “in the case of so-called traditional institutions, these had been invented and/or perverted”).

²¹ RH Jackson *Quasi-States: Sovereignty, International Relations, and the Third World* (1991). See also RH Jackson & CG Rosberg ‘Why Africa’s Weak States Persist: The Empirical and the Juridical in Statehood’ (1982) 35 *World Politics* 1.

The organisation of the colonial state was a response to the native question—how best a foreign minority could rule over an indigenous majority.²² One response to this dilemma was the ideology of segregation, which privileged Europeans and ‘civilized’ natives over ‘uncivilized’ natives; the former enjoyed citizenship and rights, but the latter were subjected to “an all-round tutelage”²³ in the interests of social comfort and convenience. Lord Lugard explained the segregation policy:

On the one hand the policy [of segregation] does not impose any restriction on one race which is not applicable to the other. A European is strictly prohibited from living in the native reservation, as a native is from living in the European quarter. On the other hand, since this feeling exists, it should in my opinion be made abundantly clear that what is aimed at is a segregation of social standards, and not a segregation of races. The Indian or the African gentleman who adopts the higher standard of civilization and desires to partake in such immunity from infection as segregation may confer, should be as free and welcome to live in the civilized reservation as the European, provided, of course, that he does not bring with him a concourse of followers. The native peasant often shares his hut with his goat, or sheep, or fowls. He loves to drum and dance at night, which deprives the European of sleep. He is sceptical of mosquito theories. “God made the mosquito larva”, said a Moslem

²² Mamdani *Citizen and Subject* (note 19 above) 16.

²³ As above, 17 (stressing, “a propertied franchise separated the civilized from the uncivilized”).

delegation to me, “for God’s sake let the larva live”. For these people, sanitary rules are necessary but hateful. They have no desire to abolish segregation.²⁴

Segregation is today still the dominant ideology in the majority of African states and manifests itself in various forms. Like their former colonial masters, the inheritance elite, rich, black rulers—the “Big Men” of African politics²⁵—continuously taunt and look down from their pathological political kingdoms upon the poor people they rule. Achebe forcefully and admirably portrays this colonial heritage in his novels, *A Man of the People*²⁶ and *Anthills of the Savannah*;²⁷ the former fictionalises a “big man” ruler in Africa; the latter depicts the new native government’s adoption of the imperialist rhetoric for oppression and suppression of the poor. African states clearly represent the strongest and most apparent example of the unwavering reliance on colonial political forms.²⁸

The transfer of power from the coloniser to the colonised African peoples has generally been equated with the application of the rules of decolonisation according to the procedures of international law. This is a lie; decolonisation meant a transfer of rudimentary political powers to the formerly colonised with no real transformation in the structures of domination.²⁹ As soon as the euphoria of decolonisation and legitimisation

²⁴ FD Lugard *The Dual Mandate in British Tropical Africa* (1965) 149-50.

²⁵ See W Mutunga *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (1999) (providing a vivid description of the “Big Man” in African politics).

²⁶ C Achebe *A Man of the People* (1966).

²⁷ C Achebe *Anthills of the Savannah* (1987) (describing the Kangan struggle for a successful postcolonial self-government, through the experience of three friends who are intricately involved in the Kangan government).

²⁸ See A Hansen ‘African Refugees: Defining and Defending Their Human Rights’ in Ronald Cohen *et al* (eds) *Human Rights and Governance in Africa* (1993) 139 161.

²⁹ SN Grovogui *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (1996) 2 (analysing the inadequacies of international law to meet the desire of colonised to achieve true sovereignty and self-

of self-determination ebbed, the new political elites were confronted with the profound incompleteness of state formation and consolidation. The integration, disintegration, and deformation wrought by colonialism have led to continuous processes of confrontations and adjustments.³⁰ The so-called “first liberation”—the transition from colonial to independent rule that swept Africa between 1957 and 1964, except the south—did not lead to “a restoration of Africa to Africa’s own history, but the onset of a new period of indirect subjection to the history of Europe”.³¹

Decolonisation produced an anti-thesis of denial and alienation. As Kreijen argues, “decolonisation, or rather the morally instigated legal revolution on which it was premised, constituted a sudden swing from effectiveness to legality in international legal thought that was too much to handle for the essentially decentralised international legal order”.³² The inheritance elites did not have the capacity to discharge the functions associated with national sovereignties, such as the maintenance of the rule of law, regulation of borders, and provision of social services.³³ Governments of these new states were expected to shoulder the burdens of formulating and implementing policies that would transform society, whether in agriculture, industrialisation, education, health or other sectors, unmindful that the new rulers lacked the historical precedent and

determination). Cf O Nnoli *Ethnicity and Development in Nigeria* (1995) 10 (arguing that post-colonial political and administrative structures subverted hitherto traditional structures, institutions, and values or make them subservient to the economic and political needs of the imperial powers).

³⁰ See M Doornbos ‘The African State in Academic Debate: Retrospect and Prospect’ (1990) 28(2) *The Journal of Modern African Studies* 179 181.

³¹ See Davidson (note 1 above) 10.

³² Cf Kreijen (note 4 above) 2. See also above, 141 (arguing: “Due to their rapid emergence as independent states many of the former colonies were extremely weak, from both an institutional-political and an economic perspective”).

³³ Cf L Emmerij ‘Co-responsibility versus Double Standards’ in A Adedeji (ed) *Africa Within the World: Beyond Dispossession and Dependence* (1993) 97 106 (“Sharply divided ethnic groups, little or no education for the majority of the people, and virtually no trained African administrators were but a few of the problems faced at independence”).

experience necessary to define and develop their positions and roles *vis-à-vis* the civil society.³⁴ Predictably, they failed to deliver on the great expectations. “In case after case”, says Doornbos, “high expectations were followed by profound disillusionment, and the role attributed to the African state changed from the prime mover of development to that of its main obstacle”.³⁵ Africa’s institutions have failed to deliver public service works or to implement vital obligations of governments, including those on socio-economic rights.

Postcolonialism is a primary and secondary cause of human rights violations in Africa, including polarization, ethnic domination, class conflict and geo-political competition, and elimination or reduction of political opposition or pluralism.³⁶ A typical post-colonial state is a lame but partisan Leviathan,³⁷ suspended above society, omnipresent but hardly omnipotent.³⁸ It is “rooted in authoritarianism and ethnic divisions, widespread illiteracy, and extreme marginalisation of African peoples”.³⁹ It constitutes a realm of “free, arbitrary action and discretion of personally motivated favor and valuation”.⁴⁰ It concentrates all the social goods in the hands of the inheritance elites,

³⁴ See Doornbos (note 30 above) 182 (“The state was to pull the whole society along in an all-out development drive on several fronts”).

³⁵ Above, 183.

³⁶ See HC Carey ‘The Postcolonial State and the Protection of Human Rights’ (2003) 22 *Comparative Studies of Asia, Africa and the Middle East* 59 61 (stressing that these pathologies are associated with postcolonialism because of the non-democratic norms and institutions that colonialism established).

³⁷ See passim T Callaghy ‘The State as Lame Leviathan: The Patrimonial Administrative State in Africa’ in Zaki Ergas (ed) *African States in Transition* (1987); Young ‘The African Colonial State’ (note 7 above) 61.

³⁸ See, in general, M Mutua ‘Putting Humpty Dumpty Back Again: The Post-Colonial African State’ (1995) 21 *Brooklyn Journal of International Law* 5055.

³⁹ Algiers Declaration OAU Assembly 35th Ord Sess Res AHG/Dec1(XXXV) OAU Doc DOC/OS(XXVI)INF17a (1999) [hereinafter Algiers Declaration].

⁴⁰ M Weber *Economy and Society: An Outline of Interpretive Sociology* (1978) 979.

who distribute it in a manner that has been anything but even.⁴¹ The disillusionment arising from state failure translated into revolts in many states. To suppress these revolts, states resorted to authoritarianism and the entrenchment of personal rule, which further eroded their legitimacy.⁴² The coercive and exploitative character of African states has “effectively trumped its ability to secure genuine widespread allegiance among the majority African population”.⁴³

The task of human rights protection in Africa, says Carey, “is more complicated because most postcolonial elites are products of or are influenced by the anticolonial movements, which often replicated colonial practices.”⁴⁴ Most of Africa has a centrally directed but uneven development,⁴⁵ and public officials serve particular interests rather than the common good.⁴⁶ Modern politics in Africa remains largely that of personal networks of obligations and exchange, what Bayart calls “the politics of the belly”—“the rush for spoils in which all actors—rich and poor—participate in the world of networks”.⁴⁷ Legal-rational modes of governance, which rely on impersonal

⁴¹ See C Young ‘Ethnicity and the Colonial and Post-Colonial State in Africa’ in P Brass (ed) *Ethnic Groups and the State* (1985) 104.

⁴² See Grovogui (note 29 above) 181.

⁴³ Okafor (note 18 above) 99 (discussing the historical development of contemporary forms of socio-cultural fragmentation within African states).

⁴⁴ Carey (note 36 above) 62.

⁴⁵ See Nnoli (note 29 above) 10 (arguing that colonialism laid an economic infrastructure that was “geared exclusively to satisfying the needs of the colonial metropolis”).

⁴⁶ See, in general, M Bratton & N de Walle *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (1997); TM Callaghy *The State-Society Struggle: Zaire in Comparative Perspective* (1984).

⁴⁷ J Bayart *The State in Africa: The Politics of the Belly* (1993) (providing a view of African inequality in which the African ruling class is given full marks for agency); contra Mamdani (note 19 above) 337 (arguing that clientelism is more an effect of the form of power rather than an explanation of it).

bureaucracies, are still the exception rather than the rule.⁴⁸ Africa's civil service generally lacks the human and material resources to discharge its functions properly.⁴⁹ It has been deeply politicised, leading to a diluted credibility and integrity and a diminished sense of professional prospects, loss of motivation by workers, and apathy.⁵⁰ Although the civil service exists to implement government policies, its ability to discharge its functions has depended on the form of government at any point in time. Its weakening has led to many unauthorised absenteeism, lateness, idleness, and, of course, poor output. The mentality of a typical civil servant in Africa tends to be, "It is not my father's work. Work or no work, I must collect my salary".⁵¹

The African state is predatory in character. It gears most of its institutions towards crushing opposition in the name of forging a national unity and facilitating economic development.⁵² To keep power and avoid strong oppositions, many 'modern' African leaders emasculate many institutions of governance, including the judiciary, and prohibit multiparty political arrangements. They curb the freedom of expression, "through the harassment, arbitrary arrest and detention of journalists, victimisation of media".⁵³ The "hard, repressive conduct on the part of the police is regarded as legitimate" in many states, and such conduct "increases the likelihood of [further] police violations of human

⁴⁸ See VT Le Vine 'African Patrimonial Regimes in Comparative Perspective' (1980) 18(4) *Journal of Modern African Studies* 657 659.

⁴⁹ See JA Sulemane & S Kayizzi-Mugerwa 'The Mozambican Civil Service: Incentives, Reforms and Performance' in S Kayizzi-Mugerwa (ed) *Reforming Africa's Institutions: Ownership, Incentives, and Capabilities* (2003) 199 200.

⁵⁰ See M Salisu 'Incentive Structure, Civil Service Efficiency and the Hidden Economy in Nigeria' in *Reforming Africa's Institutions* (note 49 above) 170 171.

⁵¹ ST Ajayi, a former Nigerian Civil Service Commissioner, quoted in Salisu (above) 170.

⁵² See M Carbone 'Weak Civil Society in a Hard State: Lessons from Africa' (2005) 1(2) *Journal of Civil Society* 170.

rights”.⁵⁴ These predatory states also frustrate the growth of civil societies; adopt strict licensing and registration laws; and retain draconian powers of deregistration.⁵⁵

As states became enemies of the citizens, harsh governments or primitive dictatorships became the norm, with one dismal tyranny giving way to a worse one.⁵⁶ Many of these tyrants, though tired, have refused to retire. Zimbabwe is today sliding hastily towards anarchy under its patriarch Mugabe, who has ruled for twenty-six years, with no exit plan. His government, which masquerades as a passion for land restitution, is famous for continuous human rights violations, lack of respect for the rule of law, and a growing culture of impunity.⁵⁷ His grotesque story is symptomatic of many others who, after a promising start, descend into tyranny, corruption and mismanagement.

Reflecting on these pathologies, An-Na'im cautions that “it is unrealistic to expect the post-colonial African state to effectively protect human rights when it is the product of colonial rule that is by definition the negation of these rights”.⁵⁸ Any serious efforts at meeting human security in Africa must begin with addressing its many pathologies, including restructuring the institutions of governance. Of course, colonial legacies and institutions might be difficult to change, but the tragedy lies in giving up in the attempt.

⁵³ See Resolution on Freedom of Expression OAU Doc AHG/229 (XXXVII) (May 2001) pmbi para 4. See also NJ Udombana ‘Can the Leopard Change Its Spots? The African Union Treaty and Human Rights’ (2002) 17 *American University International Law Review* 1177 1229-1232.

⁵⁴ See N Uldriks & P van Reenan ‘Human Rights Violations by the Police’ (2001) 2 *Human Rights Review* 64 72.

⁵⁵ See W Maina ‘Kenya: The State, Donors and the Politics of Democratisation’ in AV Rooy *Civil Society and the Aid Industry* (1998) 137.

⁵⁶ See Davidson (note 1 above) 9.

⁵⁷ See Resolution on the Situation of Human Rights in Zimbabwe 2005 Annual Activity Report of the African Commission Annex III (Dec 2005) pmbi (calling on Zimbabwean Government to cease from forced evictions throughout the country, to respect the fundamental rights and freedoms of expression, association and assembly, and to uphold the principle of separation of powers and the independence of the judiciary). See above paras 2 4 & 5.

3.2.2 Conflicts

Although Africa has broken the colonial yoke, it inherited a legacy of conflicts that still defines it. In 1996, the OAU declared that Africa, “at present, holds the record of inter-state wars and conflicts”.⁵⁹ Conflicts have become time bombs, exploding in several states like Angola, Liberia, Sierra Leone, Ethiopia, Eritrea, DR Congo, Uganda, Sudan, Somalia, Burundi, and Cote d’Ivoire. In some countries, like Sudan and, until recently, Angola, warfare is written into the whole fabric of social relations, with a majority of the population living lives in a context of war and conflicts. While Africa tries to smother old fires of conflicts, as in Angola, Sierra Leone, DR Congo and Somalia, new ones rapidly brew up, as in Sudan’s Darfur.

Extensive literature abounds on the causes of Africa’s conflicts,⁶⁰ among them the endemic competition for resources—land, minerals, drugs, timber concessions, and other valuable commodities. Quantitative analysis demonstrates that easily taxed or looted primary commodities increase the likelihood of war, by providing the motivation, prize, and means of a violent contest for state or territorial control.⁶¹ The increasing poverty resulting from a cruel and unjust social system and the adverse exploitation of cultural

⁵⁸ AA An-Na’im ‘The Legal Protection of Human Rights in Africa: How to Do More With Less’ in A Sarat & TR Kearns (eds) *Human Rights: Concepts, Contests, Contingencies* (2001) 89 98.

⁵⁹ Yaoundé Declaration OAU 32d Ord Sess OAU Doc AHG/Decl.3 (XXXII) (8-10 July 1996) [hereinafter Yaoundé Declaration] para 6.

⁶⁰ See, in general, A Adedeji (ed) *Comprehending and Mastering African Conflicts: The Search for Sustainable Peace and Good Governance* (1999); T Ali & R Matthews (eds) *Civil Wars in Africa: Roots and Resolution* (1999).

⁶¹ See, in general, P Collier *Economic Causes of Civil Conflict and Their Implications for Policy* (2000).

diversities and religious specificities complicate these problems.⁶² In Angola, the exploitation of oil and diamonds financed and motivated the military operations, with international corporations and foreign powers playing an enabling role in the strategy of the belligerents.⁶³ Western vested interests and, in particular, their participation in small arms deals and “conflict resources” fuels these conflicts. According to Cramer: “International arms markets, the use of external debt or foreign exchange, especially mineral based, to purchase arms, the integration of cross-border weapons and criminal networks, foreign military ‘aid’, are all characteristics of many modern ‘civil’ wars”.⁶⁴ These activities have rendered resolutions of Africa’s conflicts extremely difficult, if not almost impossible.⁶⁵

The colonial boundaries also engender Africa’s conflicts. The infamous *Scramble* at the Berlin Conference of 1884-5 saw the slicing of Africa into various spheres of influence. The European powers used artificial maps to define Africa’s boundaries, making territorial allocations solely to reduce armed conflicts among themselves rather than any regard for local inhabitants or geography.⁶⁶ As Mazrui puts it, “what we regard

⁶² See OAU Ouagadougou Declaration OAU Doc AHG/Decl I (XXXIV) (June 1998) [hereinafter Ouagadougou Declaration] pmb1.

⁶³ See P Le Billon ‘Angola’s Political Economy of War: The Role of Oil and Diamonds 1975-2000’ (2001) 100 *African Affairs* 55.

⁶⁴ C Cramer ‘The Economics and Political Economy of Conflicts in Sub-Saharan Africa’ in Center for Development Policy & Research *Discussion Paper 1099* (1999) 5.

⁶⁵ See Commission for Africa *Our Common Interest: Report of the Commission for Africa* (2005) 150 [hereinafter *Our Common Interest*].

⁶⁶ See J Herbst ‘The Creation and Maintenance of National Boundaries in Africa’ (1989) 43 *International Organization* 673 678-85; S Touval *The Boundary Politics of Independent Africa* (1972) 3-17. See, in general, M Mutua ‘Why Redraw the Map of Africa: A Moral and Legal Inquiry’ (1995) 16 *Michigan Journal of International Law* 1113; T Pakenham, *The Scramble for Africa: White Man’s Conquest of the Dark Continent from 1876 to 1912* (1991); AD Smith *National Identity: Ethnonationalism in Comparative Perspective* (W Connor (ed) 1991) 15.

as Africa today is primarily what Europeans decided was Africa”.⁶⁷ Only Botswana, Burundi, Egypt, Ethiopia, Lesotho, Madagascar, Morocco, Rwanda, Swaziland, and Tunisia have something that resembles pre-colonial territorial and political identity.⁶⁸ Other states are what Anderson calls “imagined communities”,⁶⁹ where “members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion”.⁷⁰

More frequently, several ethnic groups have found themselves in the same country,⁷¹ living on either side of the administrative frontier. The *Yorubas* were previously united under the Oyo Empire, but they were divided into the colonies of Dahomey, Nigeria, and the Protectorate of Lagos.⁷² The *Ewes* were divided between Gold Coast and Togo, *Efiks* and *Ibibios* between Nigeria and Cameroon and the *Somali* between Ethiopia, Somalia, Kenya and Djibouti.⁷³ The *Asante* of the Asante Empire found themselves in Ivory Coast (now Cote d’Ivoire) and Ghana. The *Mossi* were divided into Ghana and Burkina Faso (then called Upper Volta), while the *Kanuri* of Kanem-Bornu Empire became colonial subjects in Nigeria, Cameroon, and Chad.⁷⁴ In southern Africa, Malawi, South Africa, Zambia, Botswana, Lesotho, and Zimbabwe became countries that developed out of the

⁶⁷ AA Mazrui *The Africans: A Triple Heritage* (1986) 101.

⁶⁸ See C Young ‘The Heritage of Colonialism’ in JW Harbeson & D Rothschild (eds) *Africa in World Politics* (1991) 19.

⁶⁹ B Anderson *Imagined Communities* (1992) 16 (explaining that a nation is always “a deep horizontal comradeship”, notwithstanding the actual inequality and hierarchy that may prevail within it).

⁷⁰ Above, 6.

⁷¹ See M Palmberg *National Identity and Democracy in Africa* (1999) 11.

⁷² Above.

⁷³ Above.

⁷⁴ Above.

actions of Shaka, the Zulu warrior, and the intrigues of British settlers led by Cecil Rhodes.⁷⁵

There is hardly any African state without a frontier problem with its adjacent neighbour;⁷⁶ in fact, the former colonial rulers reportedly bequeathed 103 border disputes to Africa.⁷⁷ To illustrate, Benin and Niger are in conflict over the Lete Island on the River Niger and the Mekrou region.⁷⁸ Algeria disputes with Libya because of the latter's claim over a part of the southeastern region.⁷⁹ The islands of Anjouan (Nzwani) and Moheli (Mwali) in the Comoros have moved to secede from the French-administered Mayotte.⁸⁰ Most of the Congo River boundary with the Republic of the Congo is indefinite, with no agreement on the division of the river or its islands, except in the Pool Malebo/Stanley Pool area.⁸¹ Cameroon disputed for years with Nigeria over the Bakassi Peninsula, until the International Court of Justice (ICJ) decided on the dispute in 2002.⁸² Nigeria, to its

⁷⁵ Above.

⁷⁶ See A Asiwaju 'The Conceptual Framework' in A Asiwaju *Partitioned Africans: Ethnic Relations Across Africa's International Boundaries, 1884-1984* (1984) 1 ("Since the attainment of political independence, there is hardly one of these states which has not had cause to worry about the position of its boundaries *vis-à-vis* its neighbours"). See also, in general, CG Widstrand (ed) *African Boundary Problems* (1964).

⁷⁷ See K Somerville 'Border Dispute an African Legacy' *BBC News Online* 10 Oct 2002 available at <http://news.bbc.co.uk/2/hi/africa/2316645.stm> (commenting on the Cameroon and Nigeria border conflict in the context of boundary problems in Africa).

⁷⁸ See 'Benin, Niger Take Land Dispute to The Hague' *IRIN News Online* 24 June 2001 available at <http://www.africaonline.com/site/Articles/1,10,3634.jsp> [hereinafter *IRIN*] (reporting that Benin and Niger have signed an agreement to submit their border dispute to the ICJ for resolution and giving a summary of current disputes being negotiated between African countries).

⁷⁹ Above.

⁸⁰ Above.

⁸¹ Above.

⁸² See *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)* ICJ General List No 94 10 Oct 2002 available at http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.PDF [hereinafter *Cameroon Case*] (determining the boundary between Cameroon and Nigeria requesting each party to withdraw all administrative and military or police forces present on the territories falling under the sovereignty of the other party).

praise, has largely complied with the Court's judgment and orders, thus avoiding another major military confrontation between two African states. In reaching its decision, the ICJ reflected on the artificial African boundaries.

Egypt is claiming the "Hala'ib Triangle", a barren area of 20,580 square kilometres under partial Sudanese administration defined by an administrative boundary that supersedes the treaty boundary of 1899.⁸³ Besides its maritime disputes with Cameroon and Nigeria, Equatorial Guinea also disputes with Gabon over islands in Corisco Bay.⁸⁴ In Ethiopia, most of the southern half of the boundary with Somalia is a Provisional Administrative Line, besides disputes over the Ogaden. Ethiopia and Eritrea also dispute the alignment of boundary, which led to armed conflict in 1998 that is largely unresolved despite arbitration efforts.⁸⁵ Administrative boundary between Kenya and Sudan does not coincide with international boundary, leading to periodic conflicts.⁸⁶ The same goes for Gambia and Senegal, which has an indefinite boundary.

Libya disputes with Tunisia over a 19,400 square kilometres in northern Niger and part of southeastern Algeria. In Madagascar, there are claims over Bassas da India, Europa Island, Glorioso Islands, Juan de Nova Island, and Tromelin Island (all administered by France). Malawi disputes with Tanzania over the boundary in Lake Nyasa (Lake Malawi), while Morocco claims and administers Western Sahara, though sovereignty is unresolved and the UN is attempting to hold a referendum on the issue.⁸⁷

⁸³ See *IRIN* (note 78 above).

⁸⁴ Above.

⁸⁵ Above.

⁸⁶ Above.

⁸⁷ The recognition of Western Sahara by the then OAU led Morocco to withdraw from the body in 1984.

Spain controls five places of sovereignty (*plazas de soberania*) on and off the coast of Morocco—the coastal enclaves of Ceuta and Melilla which Morocco contests, as well as the islands of Penon de Alhucemas, Penon de Velez de la Gomera, and Islas Chafarinas.⁸⁸ Namibia disputes with Botswana over uninhabited Kasikili (Sidudu) Island in Linyanti (Chobe) River. The ICJ resolved the dispute in favour of Botswana in 1999, but there remains a contest over one other island in Linyanti River. Seychelles is claiming Chagos Archipelago in British Indian Ocean Territory. Meanwhile, Swaziland has asked South Africa to open negotiations on reincorporating some nearby South African territories that are populated by ethnic Swazis or that were long ago part of the Swazi Kingdom.⁸⁹ The list is long and dismal.

The *uti possidetis juris* principle—that disastrous sword of Damocles that enshrines the inviolability of frontiers inherited from colonialism—compounds Africa’s boundary problems cum conflicts. Both the UN and the OAU/AU flatly reject any *ex ante* right to secession, insisting on the cosmopolitan, multi-ethnic solution under all circumstances, even if, as Skurbaty points out, “the professed Pollyanna of democracy plus minority rights threatens to turn (in some specific cases) into forced cohabitation”.⁹⁰ In the *Burkina Faso v Mali* case,⁹¹ the ICJ emphasized that *uti possidetis juris* constituted a general

⁸⁸ See *IRIN* (note 78 above).

⁸⁹ Above.

⁹⁰ Z Skurbaty *As If Peoples Mattered: A Critical Appraisal of ‘Peoples’ and ‘Minorities’ from the International Human Rights Perspective and Beyond* (2000) 27; cf UN GA Res 2625 (XXV) (1970); OAU Res 16(1) (1964); Constitutive Act of the AU adopted 11 July 2000 entry into force 26 May 2001 OAU Doc CAB/LEG/23 15 479 (2000) (as amended by the Protocol on Amendments to the Constitutive Act of the AU 11 July 2003) [hereinafter AU Act] art 4(b) (enshrining “respect of borders existing on achievement of independence”).

⁹¹ *Burkina Faso v Mali* case (1986) ICJ Rep 554.

principle, whose purpose was to prevent the independence and stability of new states from being endangered by fratricidal struggles provoked by the challenging of frontiers.⁹²

Some publicists claim that *uti possidetis juris* is still relevant today, as evidenced by the practice of states during the dissolution of the former Soviet Union, Yugoslavia and Czechoslovakia, “apparently sanctifying the former internal administrative lines as interstate frontiers”.⁹³ In the case of Africa, the principle is said to have had some external and internal purposes; among these are that internationally recognised boundaries helped to confer legitimacy on the emergent states; that it prevented irredentist tendencies by neighbours from turning into territorial claims and the possible use of force; and that it gave a clear notice to ethnic minorities that secession or adjustment of borders was not an option.⁹⁴ Some commentators even argue that, given the current international system’s greater emphasis on preserving its constituent components as defined by internationally recognised boundaries, African states are much more secure than states of equivalent relative weakness.⁹⁵ This is a possibility, though not a probability, but the present writer does not share this optimism.

The impacts of Africa’s conflicts are everywhere evident; and they stretch beyond the countries immediately affected. War in surrounding countries has adversely affected countries like Tanzania and Cote d’Ivoire, though the latter now exports refugees to

⁹² Above, 566–7; see also Award of the Tribunal in the *Guinea-Guinea (Bissau) Maritime Declaration* case (1985) 77 *International Law Reports* 77 636 657 para 40; Award of the Tribunal in *Guinea (Bissau)—Senegal Delimitation* case (1989) 83 *International Law Reports* 1 22; and the Separate Opinion of Judge *Ad Hoc* Ajibola in *Territorial Dispute (Libya/Chad)* case (1994) ICJ Rep 83-92.

⁹³ SR Ratner ‘Drawing a Better Line: Uti Possidetis and the Borders of New States’ (1996) 90 *American Journal of International Law* 590 590; see eg Charter of the Commonwealth of Independent States (1995) 34 *International Legal Materials* 1279 1283; SC Res 713 pmbl para 8 UN SCOR 46th Sess Res & Dec UN Doc S/INF/47 (1991) 42 42-3.

⁹⁴ See Ratner Drawing a Better Line (note 93 above) 595; see also Touval (note 66 above) 90.

⁹⁵ See J Ravenhill ‘Redrawing the Map of Africa’ in *The Precarious Balance* (note 1 above) 282 283.

neighbouring West African countries. Overall, violent conflicts in Africa have killed and displaced more people than in any other continent in recent decades.⁹⁶ They have forced millions of people, including women and children, into drifting lives, deprived of their means of livelihood, human dignity, and hope.⁹⁷ They drive poverty and exclusion and undermine development and growth. Several instruments of the OAU/AU attest to this problem, such as the Cairo Declaration, which states that conflicts “have brought about death and human suffering, engendered hate and divided nations and families . . . gobbled-up scarce resources, and undermined the ability of our countries to address the many compelling needs of our people”.⁹⁸ The AU Act similarly stresses that conflict “constitutes a major impediment to the socio-economic development of the continent”.⁹⁹ “[N]o single internal factor”, according to the PSC Protocol, “has contributed more to socio-economic decline on the Continent and the suffering of the civilian population than the scourge of conflicts within and between our States”.¹⁰⁰

The tragedy in all this is that while the rest of the world increasingly concerns itself with bread-and-butter issues—such as jobs, health care and education—, Africa still grapples with war-and-peace issues—boundary disputes, conflicts, resource control,

⁹⁶ Above, 250.

⁹⁷ Protocol Relating to the Establishment of the Peace and Security Council of the African Union adopted 9 July 2002 [hereinafter PSC Protocol] *available at* www.africa-union.org [hereinafter AU Web site] pmbl; cf Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, Assembly of Heads of State and Government OAU 29th Ord Sess OAU Doc AHG/Decl.3 (XXIX) (1993) para 9 [hereinafter Cairo Declaration] (“Conflicts have forced millions of our people into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope”); *Our Common Interest* (note 65 above) 250 (noting that conflict in Africa “has driven poverty and exclusion, undermined growth and development, and deprived many of their right to life, liberty, and security as enshrined in Article 3 of the Universal Declaration of Human Rights”).

⁹⁸ Cairo Declaration (note 97 above) para 9.

⁹⁹ AU Act (note 90 above) pmbl.

¹⁰⁰ PSC Protocol (note 97 above) pmbl.

dictatorships, corruption and bad governance, and minority problems—in this twenty-first century. These problems continue to derail Africa’s march towards sustainable development and the realisation of socio-economic rights for its citizens. Thirty-four of the forty-nine countries currently classified as Least Developed Countries (LDCs) by the UN are from Africa.¹⁰¹ Africa is deeply in need of a new way beyond the darkness that repeatedly envelops it.

3.2.3 Corruption and Mismanagement of Resources

The post-colonial African governance suffers from a crisis of leadership, legitimacy, and integrity. Government’s inability to implement socio-economic rights is a problem more of nurture than of nature; it results from the mismanagement of available resources. The abuse of power has been a significant force in contributing to wide disparities in human lives and to gross human rights violations. Politics and power play make Africans seemingly more vulnerable to hunger and starvation than those of other continents. Africans are powerless over the uses and misuses of resources by their governments who, in turn, are impotent in global power relations.

To state that Africa is corrupt is really to state the obvious. A typical African society has become an emblem of crass materialism, with leaders famous for financial excesses. A typical national media regularly carries stories of looted monies stashed in foreign banks, lost through endemic corruption and abuse of office. The modern African culture valorises wealth, however crooked and illicit the manner of its accumulation. Extensive governmental involvement in the economy and regulation of public life creates further

¹⁰¹ See UN Conference on Trade and Development, Statistical Profiles of the Least Developed Countries UN Doc

opportunities for brigandage. Political corruption has done the greatest harm to Africa's economic, political and social development, undermining the legitimacy of public institutions. Access to public service is an opportunity for corrupt self-enrichment. The illicit acquisition of personal wealth by public officials and their cronies has had damaging effects on society, ethical values, justice, the rule of law, and sustainable development.

The level of corruption and the figures involved often stagger belief; usually, the figures constitute a substantial proportion of the resources of the state concerned, enough to advance the socio-economic rights of citizens at the material point in time. Some of the "big men" of African politics are no better than armed-gangs. Mobutu Sese Seko of Zaire (now Democratic Republic of the Congo), looted over \$10 billion (US) from his country's treasury.¹⁰² In Mali, former President Moussa Traore and several of his associates were recently charged for "economic crimes"; Traore, in particular, is accused of misappropriating 2 billion CFA francs (US \$2.6 million).¹⁰³ Numerous cases of large-scale official corruption have been reported in Zimbabwe in recent years. The fraud department of the Zimbabwe Republic Police reported that 91 percent of the cases it investigated in 1998 had occurred in the government, and three-quarters of them had involved the award of tenders and contracts.¹⁰⁴ In 1999-2001, misuse of resources in the

UNCTAD/LDC/Misc72 (2001) 5 [hereinafter UNCTAD/LDC].

¹⁰² See *The Guardian* [Nig] 9 Mar 2000 8.

¹⁰³ *Expo Times* (Sierra Leone) 26 Sept 2000 cited in Transparency International (TI) *Global Corruption Report 2001* (2001) 82 [hereinafter *Global Corruption Report 2001*].

¹⁰⁴ Economic Commission for Africa (ECA) *Economic Report on Africa 2002: Tracking Performance and Progress* (2002) 133 [hereinafter *ECA Report 2002*].

Zimbabwean government and in state-run companies cost the country close to \$800 million.¹⁰⁵

Nigeria presents a dramatic case study, as “egotistic” graft increasingly outweighed the “solidaristic” sort in governments.¹⁰⁶ Successive military juntas¹⁰⁷ cited corruption by civilians as one of their reasons for usurping constitutional authorities, only for these “messiahs” to become not more than pirates in power. “Successive governments”, says Human Rights Watch, “have misspent the oil wealth which the oil companies have helped to unlock, salting it away in foreign bank accounts rather than investing in education, health, and other social investment, and mismanaging the national economy to the point of collapse”.¹⁰⁸

The centralized structure of military administration, with its concentration of power in the hands of a maximum ruler or a clique of the ruling junta at the head of the hierarchy, makes massive corruption and other forms of gross abuse of power possible. Nigeria’s late General Abacha, arguably one of the most despicable despots in Africa’s post-colonial history, reportedly looted \$4.3 billion (US) from Nigeria’s treasury.¹⁰⁹ In 1992, *The Financial Times* reported that 300 Nigerians own over US \$30 billion in European and North American banks, which was far more than Nigeria’s total indebtedness to

¹⁰⁵ Above.

¹⁰⁶ These terms are attributable to S Andreski *The African Predicament: A Study in the Pathology of Modernisation* (1969) 101-2.

¹⁰⁷ Between 1 October 1960, when Nigeria gained political independence, and May 1999, when the last military regime handed back power to the civilians, the military has ruled Nigeria for almost thirty years.

¹⁰⁸ Human Rights Watch *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria’s Oil Producing Communities* (1999) available at http://www.hrw.org/reports/1999/nigeria/Nigew991-01.htm#P190_8265.

¹⁰⁹ See *The Guardian* [Nig] 8 Feb 2000 1.

foreign creditors. Similar cases of mind-boggling foreign accounts by other Africans abound.¹¹⁰

Even in the current Nigeria's civilian dispensation, President Obasanjo routinely preaches what is right, but routinely practices what is wrong. He spent a staggering sum of money building a stadium in Abuja and thereafter lobbied to host the Olympics and the World Cup. He also habitually seeks legislative approvals to add new jets to his presidential fleet,¹¹¹ in a country where the minimum wage for civil servants is ₦5,500 (less than \$50) per month;¹¹² where facilities needed for qualitative basic education are almost non-existent, where "per capita spending on health is shockingly \$3;" and where "[o]nly 38% of children are immunized against measles".¹¹³ When "viewed from the perspective of the millions of beggars that litter the streets of those countries, the hit-or-miss level of their health delivery services or indeed the accessibility of the most basic structures of self-fulfillment for their teeming generations in a modern, competitive world",¹¹⁴ these structures and lifestyles are nothing but private mausoleums, paeans to human vanity at the expense of social actualities.

Other African leaders, finding themselves in positions where the entire national treasury is placed at their disposal and without the responsibility for statutory accounting,

¹¹⁰ See A Babalola 'Legal and Judicial Systems and Corruption' in A Aderinwale (ed) *Corruption, Democracy and Human Rights in West Africa* (1994) 93-94.

¹¹¹ See eg DS Dauda 'Misplaced Priorities and Claptrap Policies' *Amana Online*, June 25 2003 available at http://www.amanaonline.com/Articles/art_391.htm (writing on the squandering of Nigeria's resources on wasteful and diversionary projects, like procurement of presidential jets).

¹¹² See National Minimum Wage (Amendment) Act No 1 (2000) sec 2 (Nigeria) available at <http://www.nigeria-law.org/LFN-2000.htm> (providing, "as from the commencement of this Act, it shall be the duty of every employer (except as provided for under this Act) to pay a wage not less than National Minimum Wage of ₦5,500.00 per month to every worker under his establishment").

¹¹³ CN Okeke 'The Debt Burden: An African Perspective' 35 *International Lawyer* (2001) 1489-1496 n.51.

¹¹⁴ W Soyinka *The Open Sore of a Continent: A Personal Narrative of the Nigerian Crisis* (1996) 113.

embarked on sheer delusions of grandeur and bruising preoccupations. The late Felix Houphouët-Boigny of Cote d'Ivoire replicated the St Peter's Basilica in his hometown of Yamoussoukro in 1989 after also moving the nation's capital there. In Kenya, poor economic governance has inhibited or hobbled development; "[w]eak infrastructure, widespread corruption, escalating insecurity, poorly managed public resources, and the public sector's inability to deliver services efficiently have undermined development."¹¹⁵ Arab Moi's Kenya was characterized by economic mismanagement, foreign debt, rampant corruption, political repression and ethnic tensions.

Overall, corruption and mismanagement of Africa's resources are obstacles to the enjoyment of socio-economic rights in Africa; they devastate the economic and social development of Africa and deepen poverty by distorting political, economic and social life. They undermine accountability and transparency in the management of public affairs¹¹⁶ and make many states fall short of their commitments to meet the basic needs of their peoples.

3.2.4 *The Crisis of Development under an Unfair IEO*

Development consists in a society's ability to maximize resources in order to satisfy man's needs in all aspects, tangible and intangible. Economic growth is a necessary condition of development and a society develops economically when its members increase their capacity for dealing with the environment, which, in turn, depends on

¹¹⁵ *Global Corruption Report 2001* (note 103 above) 7 (noting also that these governance problems have hurt private sector activities in Kenya, as shown by the decline in investment; as above).

¹¹⁶ See OAU The New Partnership for Africa's Development (Oct 2001) [hereinafter NEPAD] para 22 (noting, *inter alia*, that corruption and bad governance in many countries have hampered the development of accountable governments across Africa).

several variables. The first variable is science, that is, the extent to which the members of a society understand the laws of nature. The second variable is technology, that is, the extent to which the members of a society put that understanding into practice by devising tools. The third variable is entrepreneurship, that is, the manner in which work is organized. When these variables are absent, as they often are in Africa, then such a society may be said to be underdeveloped or, to put it mildly, developing.¹¹⁷

Africa is a huge paradox. The continent has immense wealth, potential, market and culture. Twenty percent of its total area is made up of forests, making it “the planet’s second lifeline with fabulous bio-diversity (flora and fauna)”.¹¹⁸ Africa is endowed with immense mineral and energy resources—about 30 percent of global mineral resources, such as petroleum, gas, uranium, and hydroelectric basins.¹¹⁹ Yet, NEPAD announces that, “Africa remains the poorest continent despite being one of the most richly endowed regions of the world”.¹²⁰

Africa’s development crisis is a consequence of both internal and external factors. This Chapter has already examined some of the internal factors, such as corruption and conflicts. Among the external factors is the unfair IEO.¹²¹ Dependence, exploitation, the looting of Africa’s resources, and the introduction of zones of influence have marked international relations with “organized” or “institutionalised” disorder. Africa’s

¹¹⁷ See NJ Udombana ‘The Third World and the Right to Development: Agenda for the Next Millennium’ (2000) 22 *Human Rights Quarterly* 753 756-7 (referencing W Rodney *How Europe Underdeveloped Africa* (1982) 10-11).

¹¹⁸ Commission of the AU *Our Common Destiny: Guideline Document* (2004) 5 [hereinafter *Our Common Destiny*].

¹¹⁹ Above.

¹²⁰ NEPAD (note 116 above) para 19.

¹²¹ See, in general, NJ Udombana ‘The Summer Has Ended and We are Not Saved! Towards a Transformative Agenda for Africa’s Development’ (2005) *San Diego International Law Journal* 5.

development crisis dates back to slavery, which deprived the continent of its working force—a vital component of development. It continued through the period of colonialism, during which period the continent’s resources were exploited at abandon. Since its release to independence, the collusion of powerful nations with despotic leaders and their co-option into neo-liberal economic policies have ensured the maintenance of the *status quo ante bellum*. All this makes it difficult, if not impossible, for governments to fulfil their human rights obligations to their peoples.¹²²

There are alternative theories to Africa’s underdevelopment and poverty. Some scholars, pointing to the success of the high performing Asian economies, insist that the “dependency theory” is not credible, since other performing countries were equally victims of dependency and imperialism. The remarkable economic growth of some Asian countries, like Taiwan, has been projected to discredit the dependency theory.¹²³ These scholars believe that the continuing underdevelopments of Africa are consequences of the internal political decisions of sovereign states.¹²⁴ This is a true proposition, but no single theory can account for Africa’s underdevelopment.

The current IEO was elaborated shortly before the end of World War II, when most of Africa—with the exception of Egypt, Ethiopia, and Liberia—was colonized by the then European powers: Belgium, Britain, France, Portugal, and Spain. The IEO is now

¹²² See, in general, K Raffer & HW Singer *The Economic North-South Divide: Six Decades of Unequal Development* (2001) (analysing the ways in which global poverty and unequal development contribute to an increasing global rich-poor gap); JO Ihonvbere ‘Underdevelopment and Human Rights Violations in Africa’ in GW Shepherd Jr & MOC Anikpo (eds) *Emerging Human Rights* (1990) 57; and D Greenberg ‘Law and Development in Light of Dependency Theory’ in *Law and Development* (1992) 89.

¹²³ See eg M Tsai ‘Dependency, The State and Class in the Neoliberal Transition of Taiwan’ (2001) 22 *Third World Quarterly* 359.

¹²⁴ See Y Osinbajo & O Ajayi ‘Human Rights and Economic Development in Developing Countries’ (1994) 28 *International Lawyer* 727 737.

symbolized in the trio of the International Monetary Fund (IMF), World Bank and—with the conclusion of the Uruguay Round in 1994¹²⁵—the World Trade Organization (WTO).¹²⁶ These three institutions form the backbone of a contemporary international economic legal system that focuses on global economic security. One of the goals of the WTO includes “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services”.¹²⁷ The WTO Agreement also recognises the “need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development”.¹²⁸ The WTO ties the domestic goals of full employment, poverty reduction, and social stability to the international trading system, because of the belief, arguably, that economic growth through free trade leads to greater promotion and protection of human rights.

The development-oriented goals of the Marrakesh Agreement correspond fairly with some socio-economic rights guaranteed in several human rights instruments. They correspond, for example, with the Universal Declaration of Human Rights’ rights to

¹²⁵ The Uruguay Round was launched in September 1986 in Punta del Este, Uruguay. It took four years to prepare and seven years to complete in 1994. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations 15 Apr 1994 (1994) 33 *International Legal Materials* 1125 [hereinafter Final Act].

¹²⁶ The WTO was established in 1995 to implement principles, rules, and disciplines of the Uruguay Round. See Marrakesh Agreement Establishing the [WTO] 15 Apr 1994 (1994) 33 *International Legal Materials* 1125 [hereinafter Marrakesh Agreement or WTO Agreement]. The WTO succeeds the General Agreement on Tariffs and Trade (GATT). See General Agreement on Tariffs and Trade (GATT) 30 Oct 1947 61 Stat A-11 55 UNTS 194 [hereinafter GATT 1947]. GATT 1947 was provisionally established to expedite the start of international negotiations on tariff reductions and their implementation, pending ratification and entry into force of the Havana Charter and establishment of the International Trade Organization (ITO). As the Charter never entered into force, GATT “was pressed into service by default to fill an institutional vacuum”. K Kennedy ‘A Review of Globalization and Its Discontent’ (2003) 35 *George Washington International Law Review* 251 252.

¹²⁷ See WTO Agreement (note 126 above) pmbl.

¹²⁸ Above.

work¹²⁹ and to an adequate standard of living.¹³⁰ They correspond with the International Covenant on Economic, Social and Cultural Rights' right to "an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions",¹³¹ and "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".¹³² They correspond with the Declaration on the Right to Development's¹³³ right of "access to basic resources, education, health services, food, housing, employment and the fair distribution of income".¹³⁴ They correspond with the African Charter on Human and Peoples' Rights' rights to health,¹³⁵ to education,¹³⁶ and to development.¹³⁷ Symmetries clearly exist between trade, development, and human rights. Economic development serves as the strongest predictor of improved basic needs achievement.¹³⁸

Trade, obviously, has always been an engine of growth, especially in this era of globalisation. Trade helped Japan to climb the ladder of economic development; and China's economy started roaring when it became outward driven. Trade lies at the heart

¹²⁹ See Universal Declaration of Human Rights adopted 10 Dec 1948 GA Res 217 A (III) GAOR 3d Sess [hereinafter UDHR] art 23.

¹³⁰ Above, art 25.

¹³¹ International Covenant on Economic, Social and Cultural Rights adopted 16 Dec 1966 entry into force 23 Mar 1976 993 UNTS 3 [hereinafter ICESCR] art 11(1).

¹³² Above, art 12(1).

¹³³ See Declaration on the Right to Development GA Res 41/128 UN Doc A/RES/41/128 (4 Dec 1986) [hereinafter DRD].

¹³⁴ Above, art 8(1).

¹³⁵ See African Charter on Human and Peoples' Rights adopted 27 June 1981 entry into force 21 Oct 1986 Doc OAU/CAB/LEG/67/3/Rev5 (1982) 21 *International Legal Materials* 59 [hereinafter African Charter or Charter] art 16.

¹³⁶ Above, art 17.

¹³⁷ Above, art 22.

of the success stories of Taiwan, Singapore, Hong-Kong, South Korea and other newly-industrialised nations. Why is Africa different? The answer lies in the lopsided implementation of international trade rules, which undermines Africa's contribution to global trade, compounding its efforts at economic self-reliance and causing real-life devastation and a growing social and political backlash.¹³⁹ The unfair IEO is compounded by such internal problems as absence of basic infrastructure, which increases the cost of doing business in Africa. Besides, most of Africa exports primary products, which lacks competitiveness and fetches less than ten percent of manufactured value at the global market.

Africa's report card on global trade has been dismal: "Africa in 20 years," says the Blair Commission Report, "saw its share in world trade fall from six to two percent; just one percentage point of that fall represents more than \$70 billion in foregone revenues annually."¹⁴⁰ In his forward to the Economic Report on Africa 2004, the Executive Secretary of the Economic Commission for Africa (ECA) lamented:

Trade is one of the main drivers of growth and development; yet Africa's trade performance is weak. The region's share in world merchandise exports fell from 6.3% in 1980 to 2.5% in 2000 in value terms. It recorded a meager 1.1% average annual growth over the 1980-2000 period, compared to 5.9% in Latin America and

¹³⁸ See HS Park 'Correlates of Human Rights: Global Tendencies' (1987) 9 *Human Rights Quarterly* 405 410-137. See also BE Moon & WJ Dixon 'Politics, the State, and Basic Human Needs: A Cross National Study' (1985) 29 *American Journal of Political Science* 661 689-90.

¹³⁹ See, in general, NJ Udombana 'A Question of Justice: The WTO, Africa, and Countermeasures for Breaches of International Trade Obligations' (2005) 38 *The John Marshall Law Review* 1153 (exploring some of the legal and developmental issues arising from the WTO trade regime, particularly as they affect Africa, and urging Africa to adopt unilateral measures to counterpoise breaches of international trade rules and strengthen its domestic economy and bargaining power in global trade negotiations, particularly as WTO remedies offer little prospects of effectiveness). For a defence of the liberal trade regime, see B McDonald *The World Trading System: The Uruguay Round and Beyond* (1998).

7.1% in Asia. Further, while about 70% of developing countries' exports are manufactures, Africa has hardly benefited from the boom in these exports. Overall on the continent, and particularly in sub-Saharan Africa, progress on export diversification has been slow.¹⁴¹

Thus, while the frontiers of globalisation have opened to capital, goods, and services, they have sadly closed to human beings.¹⁴² “Ushered in with promises of progress and prosperity for all”, globalisation has aroused fears by posing “serious threats to sovereignty, cultural and historical identities as well as gravely undermining [Africa’s] development prospects”.¹⁴³ Africa remains a mere source of cheap labour for transnationals, while increasingly being marginalised in globalised trade—though some commentators insist that its marginalisation is a perception rather than a process.¹⁴⁴

The WTO “remains overwhelmingly oriented toward trade concerns”, notwithstanding that its influence “extends well beyond the trade arena.”¹⁴⁵ It rejects a formal linkage between workers’ rights and trade liberalization¹⁴⁶ and considers policies

¹⁴⁰ *Our Common Interest* (note 65 above) 87.

¹⁴¹ KY Amoako ‘Foreword’ UN Economic Commission for Africa [UNECA] *Economic Report on Africa 2004: Unlocking Africa’s Trade Potential* (2004) [hereinafter ERA 2004] xi.

¹⁴² See *Juridical Condition and Rights of the Undocumented Migrants* 2003 Inter-Am Ct HR (ser A) No 18 at para 16 (17 Sept 2003) (Cancado J concurring) available at www.corteidh.or.cr/serie_a_ing/sa_cancado_18_ing.doc.

¹⁴³ See eg Algiers Declaration OAU Assembly 35th Ord Sess OAU Doc AHG/Decl 1 (XXXV) (July 1999) para 5.

¹⁴⁴ See P Gayama ‘Africa’s Marginalization: A Perception, Not a Process’ in *Africa Within the World* (note 33 above) 73 75 (stressing, “Africa can be marginalised only if it allows itself to be”).

¹⁴⁵ AT Guzman ‘Global Governance and the WTO’ (2004) 45 *Harvard International Law Journal* 303 305 (“This interaction between trade and non-trade issues will only grow stronger over time, and the pressure to address the conflicting priorities that result will continue to rise”).

¹⁴⁶ On the impact of WTO on labour rights, see, in general, R Bhala ‘Clarifying the Trade-Labor Link’ (1998) 37 *Columbia Journal of Transnational Law* 11 (exploring the linkage between workers rights and a liberalized international trade regime); H Cooper et al ‘Up in Smoke: WTO’s Failure in Bid to Launch Trade Talks Emboldens Protesters’ *Wall Street*

that promote workers' rights as barriers to trade. The 1996 WTO Singapore Ministerial Declaration invites challenges to laws that seek to enforce labour rights: "We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low wage developing countries, must in no way be put into question".¹⁴⁷ A faulty logic underpins these anti-human, anti-labour, rights stance, namely that national "aberrations", such as domestic laws permitting strikes, affect international trade and profits of foreign investors.¹⁴⁸ With states abdicating their roles as primary sources of labour rights protection, the majority of workers in Africa and other parts of the developing world have been left to face multinational capacities directly;¹⁴⁹ and the results of such unequal contests are predictable!

The race to the bottom fuelled by globalisation and liberalization has lowered wages in many countries, "[d]espite efficiency and productivity gains", creating unprecedented income inequality and a decrease in the standard of living for millions of people.¹⁵⁰ The rapid dismantling of trade protection, deregulation of the capital and financial market, outsourcing of work and relocation of plants, technological and other developments, have led to adverse economic and social consequences in many countries.¹⁵¹ The so-called

Journal 6 Dec 1999 at A1 (discussing the resistance of developing countries to the incorporation of labour standards in WTO agreements); and R Howse 'The World Trade Organization and the Protection of Worker's Rights' (1999) 3 *Journal of Small & Emerging Business Law* 131 (examining the role of the WTO in protecting workers' rights).

¹⁴⁷ WTO Singapore Ministerial Declaration WT/MIN(96)/DEC 13 Dec 1996 at 4.

¹⁴⁸ See A Sukthankar & S Nova 'Human and Labor Rights Under the WTO' in L Wallach & P Woodall (eds) *Whose Trade Organization? A Comprehensive Guide to the WTO* (2004) 219-220.

¹⁴⁹ See above.

¹⁵⁰ L Wallach & P Woodall *Whose Trade Organization? A Comprehensive Guide to the WTO* (2004) 284 ("Hunger has increased during the era of the WTO, not from a lack of food but from a lack of purchasing power by the poor.").

¹⁵¹ See, in general, G Biffl & J Isaac 'How Effective are the ILO's Labour Standards Under Globalisation?' Paper Presented at the IIRA/CIRA 4th Regional Congress of the Americas Centre for Industrial Relations, University of Toronto (25 – 29 June 2002) available at <http://www.cira-acri.ca/IIRA%20CIRA%20docs/Isaac%20and%20Biffl.pdf> (arguing that globalisation has made some countries, motivated by market-oriented economic doctrine and by a perception of unions as

multilateral system is nothing but a projection of the “Washington Consensus” with its insistence that “the market is the most rational way to do things correctly”.¹⁵² As Stiglitz eloquently puts it,

the net effect of the policies set by the Washington Consensus has all too often been to benefit the few at the expense of the many, the well-off at the expense of the poor. In many cases, commercial interests and values have superseded concern for the environment, democracy, human rights, and social justice.¹⁵³

Even if the global economic order is not the primary cause of poverty in Africa, an equitable economic system can contribute towards making people less miserable.¹⁵⁴

3.3 Confronting the Challenges to Realise Socio-economic Rights in Africa

The patrimonial state formations and their pathological dysfunctions—repression and extraction, massive corruption, administrative bureaucracy, enormous waste, clientelism, institutional collapse, poor policy performance, debt and infrastructure crisis—these and other pathologies make it imperative for Africa to embark on political, economic, and institutional reforms. This thesis submits that a reform of the patrimonial, predatory, and vampire states in Africa is the first real step towards advancing human security. Africa’s

being obstructive to economic efficiency, to adopt unduly conservative economic policies and to enact legislation that are incompatible with ILO standards).

¹⁵² D O’Hearn ‘Tigers and Transnational Corporations: Pathways from the Periphery?’ in R Munck & D O’Hearn (eds) *Critical Development Theory: Contributions to a New Paradigm* (1999) 117.

¹⁵³ J Stiglitz *Globalization and its Discontents* (2003) 20.

¹⁵⁴ See A Sajo ‘Socioeconomic Rights and the International Economic Order’ (2002) 35(1) *New York University Journal of International Law and Politics* 221 222.

governments must look inwards, redefine their priorities, empower their peoples, promote new strategies of politics and development, and re-articulate new holistic transformative agendas that will enable Africa to take its rightful place in the global divisions of labour and power and meet human security back home.

3.3.1 Reforming Institutions of Governance

The reformation of Africa's continental organization was long overdue, as the OAU Charter had become "a dated instrument bearing very little likeness to today's reality".¹⁵⁵ It was not surprising that the AU Act sets for the AU the obviously difficult task of taking up the multifaceted challenges confronting Africa and its peoples, "in the light of the social, economic and political changes taking place in the world".¹⁵⁶ Refreshingly, the AU promises to ensure good governance and the rule of law, to "promote and protect human and peoples' rights, [and to] consolidate democratic institutions and culture".¹⁵⁷ It also promises to "take all necessary measures" to strengthen common African institutions, and to provide them with the necessary powers and resources that would enable them [to] discharge their respective mandates effectively".¹⁵⁸

On its part, the AU should demonstrate its commitment to democracy and human rights protection in Africa by sufficiently funding Africa's regional institutions, especially the African Commission and Court. The Commission still suffers from acute

¹⁵⁵ Editorial 'Sirte and the Rest of Us' *African Topics* Nov – Dec 1999 3 (noting that the compromises were necessary to reach an agreement and produced an internal inertia that hampered reforms).

¹⁵⁶ AU Act (note 90 above) pmb1.

¹⁵⁷ Above, pmb1 para 9.

¹⁵⁸ Above, para 10.

financial problems almost two decades after its establishment;¹⁵⁹ and this has often forced it to prioritise its activities, with adverse consequences on the promotion of social rights. It appears that the AU and its Member States presently use the African Commission and similar institutions largely as public relations outfits to enhance their human rights and democratic credentials before the global community. The AU should set a new paradigm by funding the cost of rights in Africa. A thing is worth just what it costs.

The renovation of African economies and the realisation of socio-economic rights must start with political transformations, which requires building effective institutions that can make economic activity and entrepreneurship to flourish. Weak institutions will continue to pull Africa backward, with “shoestring” budgets, compromises, and external sources of power resulting in failure to fulfil treaty and constitutional obligations on socio-economic rights. African states must embark on internal political and institutional transformations, given the interdependence of good governance and economic development; neither is possible without the other. “Economic development stalls when governments do not uphold the rule of law”, and “upholding the rule of law requires institutions for government accountability”.¹⁶⁰

Given good and accountable governance, Africa can conveniently implement socio-economic rights, both in their negative and positive connotations. Good governance will aid the faithful incorporation and implementation of international norms and ensure respect for human rights at the national level. Encouragingly, democratic governance is gradually taking roots in many African countries, though few others are sliding back into

¹⁵⁹ See eg Sixteenth Annual Activity Report of the African Commission 2002–2003 2.

¹⁶⁰ United Nations Development Programme [UNDP] Millennium Project *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (2005) 31 [hereinafter *Investing in Development*].

autocracy and even anarchy. Everyone seems to recognise that democracy represents the best hope for Africa's future stability.¹⁶¹ Yet, if democracy must offer that hope, it must go beyond periodic elections to the delivery of basic needs to citizens. The ballot box is meaningful only if it puts food on the table of those who embrace it. A hungry man thinks about food, not democracy.

Botswana's economic successes clearly demonstrate that political stability and prudent economic management are critical to Africa's renaissance and development.¹⁶² Botswana not only has transparency in decision-making but also offers an example of "input that continually recharges the batteries' of government, and that the 'doors of government are open'".¹⁶³ This partially explains why the country escaped from the inglorious list of Least Developed Countries (LDCs) and is now a "middle income country".¹⁶⁴ "With a population of about a million people in the 1960s, the country sustained an average per capita economic growth rate of 10 percent from 1960 to 1980, exceeding that of South Korea or Hong Kong".¹⁶⁵ Botswana is also the world's number one producer of diamonds by value, with production worth \$1.9 billion at an average

¹⁶¹ See, in general, NJ Udombana 'Articulating the Right to Democratic Governance in Africa (2003) 24 *Michigan Journal of International Law* 1209.

¹⁶² See eg 'Botswana: Africa's prize democracy' *The Economist* 6 Nov 2004 52 (noting how good governance and sound economic policies have made Botswana a prosperous country, where its "1.8 m people are among the continent's wealthiest").

¹⁶³ Panel on Issues in Democratization in SJ Kpundeh (ed) *National Research Council Democratization in Africa: African Views, African Voices* (1992) 47 (noting also that "elections [in Botswana] have been relatively honest; the government has, in fact, kept its promises by and large, and has remained popular; and the opposition continues to act as a loyal opposition, believing sincerely in the possibility of alternation").

¹⁶⁴ Africa's Best Kept Secret: Botswana as "a Shining Liberal Democracy" (2003) *ACP-EU Courier* May-June 2003 54.

¹⁶⁵ P Clements 'Challenges for African States' (2001) 36 *Journal of Asian and African Studies* 295 303 (noting also that "[w]hile per capita private consumption throughout Sub-Saharan Africa declined at 2.1 percent a year from 1980 to 1997, in Botswana it increased at 2.3 percent").

price per carat of \$97.¹⁶⁶ Its development record stands in sharp contrast to that of most African countries:

3.3.2 *Managing Conflicts*

There is symmetry between peace and security, on the one hand, and development, on the other. Peace and development are indivisible and none is possible without the other.¹⁶⁷ Conscious of this symmetry, Africa's leaders have, in recent years, expressed their determination to confront conflicts in numerous instruments. The first instrument to consider is the CSSDCA Solemn Declaration, adopted in 2000¹⁶⁸ pursuant to the report of the ministerial meeting of the Conference on the Security, Stability, Development and Cooperation in Africa. The Declaration recognises that "the problems of security and stability in many African countries have impaired their capacity to achieve the necessary level of intra and inter-African cooperation that is required to attain the integration of the continent and is critical to the continent's socio-economic development and transformation".¹⁶⁹

The CSSDCA process creates a synergy between the various activities earlier undertaken and seeks to consolidate Africa's efforts in areas of peace, security, stability, development and cooperation. It affirms general and specific principles under four main

¹⁶⁶ See J Brew 'Confidence Grows in the Regional Economy' *African Topics* Jan - Mar 2000 21.

¹⁶⁷ See Yaoundé Declaration (note 59 above) para 24. Cf AU Act (note 90 above) pmbl (stressing that the promotion of peace, security and stability is "a prerequisite for the implementation of our development and integration agenda"); and Declaration on a Code of Conduct for Inter-African Relations OAU Doc AHG/Decl.2 (XXX) (1994) *reprinted in* (1995) 3 *African Yearbook of International Law* 382 [hereinafter Declaration on Code of Conduct] pmbl (noting that "every cooperation effort is doomed to failure in an environment devoid of stability, trust and security").

¹⁶⁸ See CSSDCA Solemn Declaration OAU Assembly 36th Ord Sess AHG/Decl 4 (XXXVI) (2000) [hereinafter CSSDCA Declaration].

¹⁶⁹ Above, para 6.

areas called “Calabashes”; these are security, stability, development, and cooperation.¹⁷⁰ Among the general principles include the interdependence of African states in matters of security, stability and development, which “makes it imperative to develop a common African agenda . . . [that] must be based on a unity of purpose and a collective political consensus derived from a firm conviction that Africa cannot make any significant progress without finding lasting solutions to the problem of peace and security”.¹⁷¹

When African states later adopted the AU Act on 11 July 2000, they made the promotion of peace, security, and stability in Africa one of their goals.¹⁷² Underpinning these goals are certain principles, including the “[p]eaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly” and “[p]eaceful co-existence of Member States and their right to live in peace and security”.¹⁷³ The PSC now serves as the “appropriate means” for the resolution of conflicts in Africa within the AU legal framework, replacing the OAU Mechanism for Conflict Prevention, Management and Resolution (MCPMR).¹⁷⁴ Like its predecessor,¹⁷⁵ the PSC’s mandate extends to the promotion of peace, security and stability in Africa; the anticipation and prevention of conflicts; and the promotion and implementation of peace

¹⁷⁰ Above, para 9.

¹⁷¹ Above, para 9(c); see also para 9(b) (“The security and development of every African country is inseparably linked to that of other African countries. Instability in one country affects the stability of neighbouring countries and has serious implications for continental unity, peace and development.”).

¹⁷² See AU Act (note 90 above) art 3(f).

¹⁷³ Above, art 4(i).

¹⁷⁴ The MCPMR was intended “to bring to the processes of dealing with conflicts in . . . [Africa] a new institutional dynamism, enabling speedy action to prevent or manage and ultimately resolve conflicts when and where they occur”. Cairo Declaration (note 97 above) para 12.

¹⁷⁵ See PSC Protocol (note 97 above) art 22(1) (“The present Protocol shall replace the Cairo Declaration.”); see also same, art 22(2) (providing that the PSC Protocol provisions shall supercede resolutions and decisions of the OAU relating to the MCPMR in Africa, which are in conflict with the present Protocol).

initiatives.¹⁷⁶ The PSC will also coordinate and harmonise continental efforts in the prevention and combating of terrorism; develop a common defence policy for the AU; and encourage democratic practices, good governance and the rule of law in Africa.¹⁷⁷

Even earlier instruments, such as the African Charter and the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights,¹⁷⁸ were important for ensuring the promotion, protecting and observance of human rights as an integral part of Africa's wider objective of promoting collective security for durable peace and sustainable development. NEPAD also pledges joint responsibility for strengthening mechanisms for conflict prevention, management and resolution at the regional and continental levels and for ensuring that these mechanisms are used to restore and maintain peace.¹⁷⁹ It hopes to build the capacity of African states to set and enforce the legal framework and to maintain law and order.¹⁸⁰

More significantly, NEPAD develops an African Peer Review Mechanism (APRM), expected to make a difference in the quality of governance in Africa. As a self-monitoring mechanism, the APRM seeks—

to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-

¹⁷⁶ Above, art 3.

¹⁷⁷ Above. See also NJ Udombana 'The Unfinished Business: Conflicts, The African Union and the New Partnership for Africa's Development' (2003) 35 *George Washington International Law Review* (2003) 55 80-87.

¹⁷⁸ See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU Doc OAU/LEG/MIN/AFCHPR/PROT (III) [hereinafter Human Rights Protocol].

¹⁷⁹ See NEPAD (note 116 above) para 49.

¹⁸⁰ Above.

regional and continental economic integration through sharing of experiences and reinforcement of successful and best practice, including identifying deficiencies, and assessing the needs for capacity building of participating countries.¹⁸¹

The APRM works through the sharing of experience and reinforcement of successful best practices, including identifying deficiencies and assessing the needs for capacity building of participating countries.¹⁸²

The avalanche of normative and institutional frameworks on peace and security illustrates that the AU and its Member States are poised to chart a new course in checkmating the scourge of conflicts that has devastated Africa. The problem, as usual, is that the reality does not match rhetoric. Yet, since the responsibility for peace and security lies primarily with Africa's governments¹⁸³—as does responsibility for development¹⁸⁴—the AU and its Member States must work harder to prevent or, at least, manage conflict. The establishment of peace and security will lead to Foreign Direct Investment (FDI) and sustainable development. A measurable reduction in defence

¹⁸¹ Memorandum of Understanding on the African Peer Review Mechanism NEPAD/HSGIC/03-2003/APRM/MOU (2003) para 8 [hereinafter APRM MOU]. Cf Declaration on the Implementation of the New Partnership for Africa's Development AU Assembly 1st Ord Sess AU Doc ASS/AU/Decl1 (I) (July 2002) para 6 [hereinafter Declaration on NEPAD].

¹⁸² On peer review generally, see F Pagani 'Peer Review as a Tool for Co-operation and Change: An Analysis of an OECD Working Method' (2002) 11(4) *African Security Review* available at www.iss.org.za/Pubs/ASR/11No4/Feature2.html. See also Joint Group on Trade and Competition Peer Review: Merits and Approaches in a Trade and Competition Context COM/TD/DAFFE/COMP(2002)4/ FINAL 6 June 6 2002 (analysing the use of peer review in a subject area).

¹⁸³ See eg CSSDCA Declaration (note 168 above) para 9(f). Cf *Our Common Interest* (note 65 above) 250 ("Responsibility for peace and security lies primarily with African governments.").

¹⁸⁴ See eg Declaration on the Economic Situation in Africa OAU Assembly 21st Ord Sess OAU Doc AHG/Decl 1 (XXI) (July 1985) para 6 [hereinafter Declaration on Africa's Economic Situation] ("We re-affirm that the development of our continent is the primary responsibility of our Governments and people".); Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World OAU Assembly 26th Ord Sess OAU Doc AHG/Decl 1 (XXVI) (July 1990) para 8 [hereinafter Declaration on the Socio-Economic Situation in Africa] ("We reaffirm that Africa's development

spending will also release scarce resources towards raising production and services, create more job opportunities, achieve economic growth and development, and generally raise living standards in Africa. As the OAU stressed:

The establishment of peace and security will not only lead to the reduction of defence expenditure, but will also enable us to redirect our resources towards raising the level of production and services, augmenting the living standards of our peoples, creating more job opportunities and achieving economic growth and development.¹⁸⁵

Most of Africa's leaders treat state resources as means for increasing military power and military power as means for gaining control of resources. These leaders must cut down on their defence spending in order to save money for development and human freedom. They seldom, if at all, plead poverty and underdevelopment when investing huge public resources in procurement of weaponry to prosecute destructive wars, but they often are quick to plead underdevelopment and lack of resources for their failure to create employment and provide social insurance or implement other forms of socio-economic rights. Yet, as the Limburg Principles declare: "In the use of the available resources due priority shall be given to the realisation of rights recognised in the [ICESCR], mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services".¹⁸⁶

is the responsibility of our governments and peoples"); NEPAD (note 116 above) para 205 ("In proposing the partnership, Africa recognises that it holds the key to its own development").

¹⁸⁵ Cairo Declaration (note 97 above) para 14.

¹⁸⁶ See The Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights adopted 8 Jan 1987 UN ESCOR Commission on Human Rights 43rd Sess Agenda Item 8 UN Doc

The resources used in prosecuting destructive wars in Africa could make it possible for governments to channel resources into human development objectives, to redirect resources towards raising the level of production and services, and to create more job opportunities. They could enable governments to revive the failed educational systems, acquire learning facilities, and hire new teachers. They could enable governments to develop infrastructures and raise living standards in Africa.¹⁸⁷ They could also enable governments to establish hospitals and to open many clinics that have been padlocked and unused across Africa, thereby fulfilling the AU's goal of working with relevant international partners to eradicate preventable disease and promote good health in Africa.¹⁸⁸ I submit that every gun that is made and imported into Africa, every warship launched, every rocket or missile fired, "signifies, in a final sense, a shift from those who hunger and are not fed, from those who are cold and are not clothed".¹⁸⁹

This thesis earlier commented on how post-colonial boundaries engender conflicts in Africa. I submit that African states should not smother the problem with the verbiage of *uti possidetis juris*. Nation status has never been an absolute or a constant, but has followed "the politics of conflict, interest, alliances, power, and even accident".¹⁹⁰ Africa's boundaries are not acts of nature; they are abnormalities of adventurism and, hence, negotiable. What is required is mutual understanding on fundamental issues, rather than governments behaving like the European imperialists who parcelled out the nations

E/CN4/1987/17/Annex (1987) art 28 *reprinted in* 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 122.

¹⁸⁷ See AU Act (note 90 above) art 3(k).

¹⁸⁸ Above art 3(n).

¹⁸⁹ General Eisenhower quoted in CG Weeramantry 'The Right to Development' (1985) 25 *Indian Journal of International Law* 482 482.

in the first place. One option is to articulate the decision of the polity that actually makes up Africa's nations.¹⁹¹ So long as Africa refuses to meaningfully confront and address its boundary problems, so long will they return to haunt the continent, like a snake that is not quite slain.

3.3.3 *Combating Corruption*

African states, individually and collectively, have joined other international actors in campaigning against corruption. Nigeria, for example, has churned out an impressive number of laws aimed at fighting corruption. In June 2000, the Obasanjo Government enacted legislation that prohibits corrupt practices and other related offences and prescribes punishment for such offences.¹⁹² It further enacted the Economic and Financial Crimes Commission Establishment (EFCC) Act in 2004 to combat financial and economic crimes. The Act empowers EFCC to prevent, investigate, prosecute, and penalise economic and financial crimes and to enforce the provisions of other laws and regulations relating to economic and financial crimes in Nigeria.¹⁹³

¹⁹⁰ See Soyinka *The Open Sore of a Continent* (note 114 above) 24.

¹⁹¹ Above, 22 (arguing that “many nations on the African continent are only in a state of limbo, that they exist in a half way space of purgatory until, by mundane processes or through dramatic events, their citizens are enabled to raise the nation reality to a higher level”).

¹⁹² See The Corrupt Practices and Other Related Offences Act (2000) Cap 5 Laws of the Federation of Nigeria 2000 secs 8–26 [hereinafter *Corrupt Practices Act*] available at <http://www.nigeria-law.org.LFNMainPage.htm>. For a commentary, see PD Ocheje ‘Law and Social Change: A Socio-Legal Analysis of Nigeria’s Corrupt Practices and Other Related Offences Act, 2000’ (2001) 45 *Journal of African Law* 173.

¹⁹³ Among the laws brought under the umbrella of the EFCC include the Money Laundering (Prohibition) Act 2004; the Advance Fee Fraud and Other Fraud Related Offences Act 1995; the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994 (as amended); the Banks and other Financial Institutions Act 1991 (as amended); and the Miscellaneous Offences Act. The Money Laundering (Prohibition) Act, for example, makes comprehensive provisions to prohibit the laundering of the proceeds of a crime or an illegal act. It provides appropriate penalties and expands the interpretation of financial institutions and scope of supervision of regulatory authorities on money laundering activities, among other things.

At the continental level, the AU has adopted a Convention on Preventing and Combating Corruption¹⁹⁴ to promote and strengthen the development of mechanisms for preventing, detecting, punishing, and eradicating corruption and related offences in Africa's public and private sectors.¹⁹⁵ The Convention sets its objectives within the context of African specificities, stressing the need to promote socio-economic development by removing obstacles to the enjoyment of all human rights.¹⁹⁶ This special emphasis is rightly situated, because a denial of socio-economic rights leads to poverty—and poverty exacerbates other social ills like corruption—in the same way that political corruption leads to a denial of socio-economic rights. The Convention further aims at promoting, facilitating and regulating co-operation among its State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa.¹⁹⁷ It aims at co-ordinating and harmonising policies and legislation between State Parties for purposes of preventing, detecting, punishing, and eradicating of corruption in Africa.¹⁹⁸ It seeks to establish the necessary conditions to foster transparency and accountability in the management of public affairs.¹⁹⁹

The Convention's objectives are laudable, but the battle to combat corruption in Africa should not merely be legal. Corruption is a prism with many sides and requires legal and non-legal approaches, including morality. Anti-corruption efforts must also

¹⁹⁴ See AU Convention on Preventing and Combating Corruption adopted 11 July 2003 [hereinafter AU Corruption Convention] (text available at the AU Web site). For a commentary, see NJ Udombana 'Fighting Corruption Seriously? Africa's Anti-corruption Convention' (2003) 7 *Singapore Journal of International and Comparative Law* 447.

¹⁹⁵ See AU Corruption Convention (note 194 above) art 2(1).

¹⁹⁶ Above, art 2(4).

¹⁹⁷ Above, art 2(2).

¹⁹⁸ Above, art 2(3).

demonstrate serious intent to deal with the malaise, which can only occur by means of realistic and creative strategies for prevention, implementation and monitoring. Encouragingly, corruption is attracting scrutiny that is more public in the present than in the past; the secretive web that once shrouded it is fast disentangling. There is now a growing tide of awareness in Africa, as elsewhere, that combating corruption is integral to achieving a more effective, fair and efficient government. This awareness creates hope for Africa, which cannot bear the costs of corruption.

Effective public budget and financial management together with mechanisms for ensuring accountability in the use of scarce resources are critical aspects of public actions to reduce poverty.²⁰⁰ The last remaining bulwark for development and survival is the stability of the public service, given the persistent instability of policies, if not regimes.²⁰¹ Transparency and accountability in the management of Africa's resources will bring competitive advantages, increase credibility from ethical and economic perspectives, and promote development in Africa. All of this will make it possible, though by no means certain, for states to fulfil their socio-economic rights obligations to citizens. *A contrario*, so long as corruption and mismanagement of resources flourish, so long will the wealth of nations translate into the poverty of peoples.

¹⁹⁹ Above, art 2(5).

²⁰⁰ See African Development Bank (ADB) 'Achieving the Millennium Development Goals in Africa: Progress, Prospects, and Policy Implications' in *Global Poverty Report 2002* (2002) 16 [hereinafter ADB Global Poverty Report].

²⁰¹ See P Okigbo 'The Future Haunted by the Past' in *Africa Within the World* (note 33 above) 28 37.

3.3.4 Sustainable Development through Regional Economic Integration

The proliferating literature on sustainable development generally associates the concept with ecologically sustainable human development. However, the development component includes economic and social development, peace and security, and human rights. The essential idea in sustainable development is the necessity of protecting and restoring the environment while fostering peace and security and economic and social development.²⁰² According to the defunct OAU, sustainable development “aims primarily at ensuring a better standard of living for present and future generations. . . . [It] is founded on democracy, human rights, good governance, human resource promotion, economic and social development, environmental protection, all with the human being, as the focal point.”²⁰³

There are many routes to attaining sustainable development and realising socio-economic rights in Africa. An earlier, albeit failed, route was through the campaign for a New International Economic Order (NIEO). The campaign began in the early seventies of the twentieth century and led to the elaboration of the Declaration on the Establishment of a NIEO.²⁰⁴ The NIEO had three goals. First, it sought to eliminate developing countries’ economic dependence on developed countries. Second, it sought to accelerate developing countries’ economies based on the principle of self-reliance. Lastly, it sought to introduce appropriate institutional changes for the global management

²⁰² See JC Dernbach ‘Achieving Sustainable Development: The Centrality and Multiple Facets of Integrated Decisionmaking’ (2003) 10 *Indiana Journal of Global Legal Studies* 247 250 (“Put still another way, sustainable development redefines progress to include environmental protection or restoration as something to be achieved along with other goals, not something to be sacrificed in order to reach those goals. Yet like traditional development, sustainable development is directed toward achieving human freedom, opportunity, and quality of life”).

²⁰³ Yaoundé Declaration (note 59 above) para 19.

of world resources in the interest of mankind as a whole. In particular, the NIEO espoused an equitable approach to international trade and economic relations between developed and developing countries and advocated preferential trade and investment treatment for developing countries. It also called for debt relief and grants-based assistance, access to technology transfers, and the recognition of the right to development.²⁰⁵

The campaign for a NIEO also led to the adoption of the Charter of Economic Rights and Duties of States in 1974,²⁰⁶ which aimed at establishing a new system of international economic relations based on equity, sovereign equality, and the interdependent interests of developed and developing countries.²⁰⁷ Some doubt that the Charter is part of customary international law, given that it was adopted as a UN General Assembly resolution and without universal acceptance.²⁰⁸ Nonetheless, the principles embodied in this and similar instruments, including the Program of Action on the Establishment of a NIEO,²⁰⁹ “represent an expansion of the movement for permanent sovereignty over natural resources, and continuation of the legal effort by Southern countries to find voice and to exercise more power over their political and economic destinies”.²¹⁰

²⁰⁴ Declaration on the Establishment of a NIEO GA Res 3201 (S-VI) 3-4 UN Doc A/9559 (1 May 1974) [hereinafter Declaration on NIEO].

²⁰⁵ See, in general, R Sarkar *Development Law and International Finance* (2d ed 2002) (chapter seven discussing whether or not there is a human right to development); EP Reubens ‘An Overview of the NIEO’ in EP Reubens (ed) *Challenge of the New International Economic Order* (1981) 1.

²⁰⁶ Charter of Economic Rights and Duties of States in 1974 GA Res 3281 (XXIX) 50 UN Doc A/9631 (12 Dec 1974) [hereinafter Charter of Economic Rights and Duties or Charter].

²⁰⁷ See RF Meagher *An International Redistribution of Wealth and Power: A Study of the Charter of Economic Rights and Duties of States* (1979) 92-128.

²⁰⁸ The Charter was adopted with 99 votes in favour, 8 against, and 29 abstentions.

²⁰⁹ Program of Action on the Establishment of a NIEO GA Res 3202 (S-VI) 5 UN Doc A/9559 (1 May 1974) [hereinafter Program of Action on NIEO].

²¹⁰ RE Gordon & JH Sylvester ‘Deconstructing Development’ (2004) 22 *Wisconsin International Law Journal* 1 57.

The global community subsequently elaborated other initiatives—multilateral, bilateral, and private—all aimed at promoting SSA’s economic renaissance and alleviating poverty. Past multilateral initiatives include the UN Transport and Communications Decade in Africa,²¹¹ the Industrial Development Decade for Africa,²¹² and the Program of Action for African Economic Recovery and Development (PAAERD),²¹³ which led to the New Agenda for the Development of Africa (NADAF). These programs sought to invigorate African development and intensify global support for its economic reforms. The PAAERD and NADAF were particularly significant, targeting an average real growth rate of 6 percent of GDP and promoting a number of people-oriented objectives, such as promoting food production and developing agro-industries and human resources.

Whether the NIEO campaign changed the development trajectory of global economic relations and, in particular, whether SSA made any meaningful gains from it remains a matter of conjecture.²¹⁴ Clearly, these initiatives have not established legal obligations for the West; rather, international law has “reinforced and reproduced the [current] economic and political inequities”.²¹⁵ Some commentators take the view that the NIEO-based agenda has been partially successful in practical terms, citing the World Bank and other

²¹¹ UN Transport and Communications Decade in Africa GA Res 32/160 UN Doc A/RES/32/160 (19 Dec 1977).

²¹² Industrial Development Decade for Africa GA Res 35/66B UN Doc A/35/592/Add.3 (5 Dec 1980).

²¹³ Program of Action for African Economic Recovery and Development GA Res S-13/2 UN Doc A/Res/S-13/2 (1 July 1986) [hereinafter PAAERD].

²¹⁴ See eg NS Rembe ‘Prospects for the Realisation of the New International Economic Order: An African Perspective’ (1984) 17 *Comparative and International Law Journal of South Africa* 322 (examining the NIEO initiative, its prospects, problems facing the realisation of an equitable and just international economic system, and options and responses of the African states).

²¹⁵ See Gordon & Sylvester (note 210 above) 7. See, in general, M Bedjaoui *Towards A New International Economic Order* (1979) (discussing the role of international law in shaping the IEO).

multilateral and bilateral institutions that are implementing large-scale debt relief.²¹⁶ Others point to the Bretton Woods institutions' Poverty Reduction Strategy Papers (PRSPs), the World Bank's Comprehensive Development Framework (CDF), and the Common Country Assessment and UN Development Assistance Framework (CCA/UNDAF), all of which "command the attention of decision makers, and make resources available for each country".²¹⁷

Critics have questioned the international financial institutions (IFIs) so-called debt relief—even from a developing country's perspective—arguably due to the implicit "moral hazard", particularly if recipient nations appear not to be credit-worthy and unattractive to investors.²¹⁸ Other critics argue that the NIEO is not serving the interests of Africa's producers and exporters. The World Bank itself estimates that SSA lost half its market share in exports of primary products between 1970 and 1983.²¹⁹ As an illustration, whereas a ton of African copper bought 115 barrels of oil in 1975, it bought only 58 barrels by 1980. Similarly, a ton of African cocoa could buy 148 barrels of oil in 1975 but only 63 barrels by 1980; and while a ton of African coffee could buy 148 barrels of oil in 1975, it could buy only 82 barrels by 1980.²²⁰ The reason for fluctuations in Africa's fortunes is that developed countries determine the price of their products as well as those of developing countries. Africa, says Cameron Duodu, "has been

²¹⁶ See World Bank *The Enhanced Heavily Indebted Poor Countries Initiative* (2005) available at <http://www.worldbank.org> (on home page, follow topics—economic policy and debt— topics—HIPC).

²¹⁷ S Marks 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 *Harvard Human Rights Law Journal* 137 153.

²¹⁸ See eg B Crossette 'Ex-Premier of Singapore Sees Pitfalls in Debt Relief' *New York Times* 15 Oct 2000 4; R Sarkar 'Critical Essay: Theoretical Foundations in Development Law: A Reconciliation of Opposites?' (2005) 33 *Denver Journal of International Law and Policy* 367 373.

²¹⁹ See World Bank *Africa's Adjustment and Growth in the 1980s* (1989) 2.

involuntarily locked into an earnings logjam on the international market, which keeps it poor when it sells to others, and poor when it buys from them”.²²¹

The Lagos Plan of Action (LPA), adopted in 1980 by the now defunct OAU,²²² also noted that the NIEO was flawed and biased against Africa. Its Preamble opened with the following scathing words:

The effect of unfulfilled promises of global development strategies has been more sharply felt in Africa than in the other continents of the world. Indeed, rather than result in an improvement in the economic situation of the continent, successive strategies have made it stagnate and become more susceptible than other regions to the economic and social crises suffered by the industrialised countries. Thus, Africa is unable to point to any significant growth rate, or satisfactory index of general well-being, in the past 20 years.²²³

It is doubtful that Africa’s situation has changed dramatically for the better since 1980, given the level of poverty that still pervades the continent. This thesis, therefore, advocates a robust regional economic integration as a way out of the sustainable development problems and as a route towards realising socio-economic rights in Africa. Economic groupings appear to be more highly evolved among advanced capitalist

²²⁰ See Davidson (note 1 above) 220.

²²¹ See C Duodu ‘Africa: The Key is Economic Justice’ *New African* July 2005 14-15 (also calling on Africa to vertically integrate its industries).

²²² OAU The Lagos Plan of Action for the Economic Development of Africa 28 Apr 1980 [hereinafter Lagos Plan of Action] available at http://www.uneca.org/itca/ariportal/docs/lagos_plan.pdf.

²²³ Above, pmb.

countries than the least developed ones, but Africa has not been left out in the cooperative enterprise. The last few decades have witnessed the elaboration of various regional cooperation agreements and the establishment of customs unions.²²⁴

Some commentators even trace the historicity of integration in Africa to the beginning of the 20th century, with the establishment of the Southern African Customs Union (SACU) in 1910.²²⁵ Our concern, however, is with contemporary developments. On this, it is worth reporting that several regional economic communities (RECs) have been established in recent memory in Africa. Among these are the Economic Community of West African States (ECOWAS),²²⁶ the Common Market for Eastern and Southern Africa (COMESA),²²⁷ the East African Community (EAC),²²⁸ and the Southern African Development Community (SADC).²²⁹ Some RECs are “customs union”²³⁰ and “common

²²⁴ See, in general, BM Carl *Economic Integration Among Developing Nations: Law and Policy* (1986) (giving details of treaties and protocols establishing regional economic groupings up to the time of her study).

²²⁵ See Economic Commission for Africa (ECA) *Assessing Regional Integration in Africa* (2004) 27 [hereinafter *ECA Assessing Regional Integration*].

²²⁶ Established pursuant to the Revised ECOWAS Treaty (1996) 35 *International Legal Materials* 660 [hereinafter Revised ECOWAS Treaty].

²²⁷ Established pursuant to the COMESA Treaty (1994) 33 *International Legal Materials* 1067 [hereinafter COMESA Treaty].

²²⁸ Established pursuant to EAC Treaty, signed 30 Nov 1999 entry into force 7 July 2000 [hereinafter EAC Treaty], available at <www.eac.int> (seeking to enhance co-operation in all areas for the mutual benefit of the States Parties through the establishment of a customs union, a common market, a monetary union and, ultimately, a political federation of the East Africa States).

²²⁹ Established pursuant to the SADC Treaty (1993) 32 *International Legal Materials* 116 [hereinafter SADC Treaty]. Some of the current RECs in Africa, besides the ones noted in the text, include the Economic Community of Central African States (ECCAS); Arab Maghreb Union (AMU/UMA); Inter-Governmental Authority on Development (IGAD); Community of Sahel-Saharan States (CENSAD); West African Economic and Monetary Union (UEMOA); Mano River Union (MRU); Central African Economic and Monetary Community (CEMAC); Economic Community of Great Lakes Countries (CEPGL); Indian Ocean Commission (IOC); and the Southern African Customs Union (SACU).

²³⁰ A “customs union” is “a free trade area in which members impose common tariffs on nonmembers. Members may also cede sovereignty to a single customs administration”. *ECA Assessing Regional Integration* (note 225 above) 10.

market”²³¹ arrangements; examples include ECOWAS, COMESA and EAC. However, whereas ECOWAS aspires for “economic and monetary union”,²³² COMESA aspires for economic union. SADC aspires for “free trade area”,²³³ though its ultimate objective is “to build a Region in which there will be a high degree of harmonisation and rationalisation to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region”.²³⁴

Among the notable instruments on economic cooperation and integration at the continental level are the Monrovia Strategy for Economic Development (the Monrovia Declaration);²³⁵ the LPA;²³⁶ the Treaty Establishing the African Economic Community (AEC);²³⁷ the AU Act; and NEPAD. The AEC Treaty shall provide the template for analysis. It sets out its objectives within the context of earlier resolutions and declarations adopted by our OAU Assembly, providing that the economic integration was a pre-

²³¹ A “common market”, on the other hand, is “a customs union that allows free movement of the factors of production (such as capital and labour) across national borders within the integration area”. Above. Cf O Johnson ‘Economic Integration in Africa: Enhancing Prospects for Success’ (1999) 29(1) *Journal of Modern African Studies* 1 2 (defining “common markets” as “the most complete form of economic collaboration among states that also choose to remain independent political entities”). Such integration, according to Johnson, “involves a common external tariff, free movement of peoples and goods, and co-ordination of macro-economic policies to ensure mutual consistency of fiscal, monetary, external payments, and exchange rate policies of the member states.” Above.

²³² See ECA *Assessing Regional Integration* (note 225 above) 10 (defining “economic union” as “a common market with unified monetary and fiscal policies, including a common currency”).

²³³ Above (defining “free trade area” as “a preferential trade area with no tariffs on imports from other members. As in preferential trade areas, members can determine tariffs on imports from nonmembers.”).

²³⁴ SADC *History, evolution and current status available at http://www.sadc.int/index.php?action=a1001&page_id=about_history.*

²³⁵ See Monrovia Declaration of Commitment of the Heads of State and Government of the OAU on Guidelines and Measures for National and Collective Self-reliance in Social and Economic Development for the Establishment of a New International Economic Order, adopted by the Assembly of States and Government of the OAU in July 1979 OAU Doc AHG/ST.3 (XVI) Rev.1 [hereinafter Monrovia Declaration].

²³⁶ See Lagos Plan of Action (note 222 above).

²³⁷ See Treaty Establishing the African Economic Community 3 June 1991 30 *International Legal Materials* 1241 [hereinafter AEC Treaty] (defining the principles and objectives of African integration and areas of cooperation, coordination of activities and exchange of experiences at the national, regional and continental levels and among regional organizations and groupings).

requisite for the realization of the objectives of the OAU.²³⁸ Africa adopted the AEC “to share, in an equitable and just manner, the advantages of cooperation among Member States in order to promote a balanced development in all parts of the Continent”.²³⁹ Its comprehensive objectives are:

- (a) to promote economic, social, and cultural development and the integration of African economies in order to increase economic self-reliance and an indigenous and self-sustained development;
- (b) to establish, on a continental scale, a framework for the development, mobilization and utilization of the human and material resources of Africa in order to achieve a self-reliant development;
- (c) to promote cooperation in all fields of human endeavour in order to raise the standard of living of African peoples and maintain and enhance economic stability, foster close and peaceful relations among member States and contribute to the progress, development and the economic integration of the continent; and
- (d) to coordinate and harmonize policies among existing economic communities in order to foster the gradual establishment of the Community.²⁴⁰

Fashioned in the image of the EU Treaty, the AEC Treaty seeks to create an AEC by liberalising trade; abolishing customs duties on imports and exports and non-tariff

²³⁸ Above, pmbl (referring to resolutions and declarations adopted in Algiers in September 1968 and in Addis Ababa in August 1970 and May 1973).

²³⁹ Above.

²⁴⁰ Above, art 4(1).

barriers in order to establish a free trade area; and adopting a common trade policy *vis-à-vis* third states. Other targets are harmonising national policies in agriculture, industry, transport and communications, energy, trade, money and finance, and science and technology;²⁴¹ establishing a common external tariff; removing obstacles to free movement of persons, goods, services and capital, and the right of residence and establishment; and establishing a common market.²⁴² The AEC Treaty affirms principles of solidarity and collective self-reliance; inter-state co-operation, harmonisation of policies and integration of programmes; and promotion of harmonious development of economic activities among Member States.²⁴³ It affirms observance of the legal system of the “Community”;²⁴⁴ peaceful settlement of disputes among Member States; active cooperation between neighbouring countries and promotion of a peaceful environment as a pre-requisite for economic development; recognition, promotion and protection of human and peoples’ rights; and accountability, economic justice and popular participation in development.²⁴⁵

Most of the principles in the AEC Treaty, such as the pacific settlement of disputes and respect for human rights, are universal values shared even by most institutions focusing on economic issues. The EU Treaty, for example, requires each Member State to respect the fundamental rights of its citizens. In *Liselotte Hauer v Land Rheinland-*

²⁴¹ Above, art 4(2).

²⁴² See above.

²⁴³ Above, art 3.

²⁴⁴ The AEC Treaty defines “Community” to mean “the organic structure for economic integration established under Article 2 of this Treaty and constituting an integral part of the [AU]”. Above, art 1(c)).

²⁴⁵ Above, art 3.

Pfalz,²⁴⁶ the European Court of Justice (ECJ) explained: “In safeguarding [fundamental rights, the Court] is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those states are unacceptable in the Community”.²⁴⁷

The AEC is fashioned to provide a rallying point for RECs’ activities, both existing and future.²⁴⁸ Its Treaty set up detailed modalities for the establishment of the AEC in six stages of variable duration over a transition period not exceeding 34 years, from the date of its entry into force, that is, 1994. Each of the six stages consists of specific activities to be concurrently implemented.²⁴⁹ The first five years—stage one—was to be devoted into strengthening existing RECs and establishing new ones in regions where none exist.²⁵⁰ The second stage of eight years involves stabilisation, at the level of each REC, of tariff and non-tariff barriers,²⁵¹ customs duties and internal taxes at the May 1994 level; determining the time table for the gradual liberalisation of regional and intra-community trade; harmonising customs duties *vis-a-vis* third states; strengthening sectoral integration, particularly in fields of trade, agriculture, money and finance, transport and communications, industry and energy; and coordinating and harmonising activities of RECs.²⁵²

²⁴⁶ Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 (ECJ).

²⁴⁷ Above, 3728.

²⁴⁸ See AEC Treaty (note 237 above) art 88.

²⁴⁹ See generally above, arts 6 & 88 (for the elaboration of the different stages).

²⁵⁰ See above, art 6(2)(a).

²⁵¹ See above, art 1(s) (defining “non-tariff barriers” as “barriers which hamper trade and which are caused by obstacles other than fiscal obstacles”).

²⁵² See above, art 6(2)(b).

The third stage, lasting ten years, involves the establishment of Free Trade Area and a Customs Union at the level of each REC.²⁵³ The fourth stage, lasting two years, involves coordinating and harmonising tariff and non-tariff barriers among various RECs leading to the establishment of a continental Customs Union.²⁵⁴ The fifth stage, lasting four years, involves establishing an African Common Market (ACM).²⁵⁵ The final stage, lasting five years, involves consolidating and strengthening structures of the ACM, including free movement of peoples and factors of production. It also envisages the creation of a single domestic market and Pan African Economic and Monetary Union (PAEM), African Central Bank (ACB) and African Currency; and the establishment of a Pan African Parliament (PAP).²⁵⁶

The AEC Treaty deals with each of these sectoral issues in some details and provides for adoption of protocols to address others. Some specific matters it addresses include rules of origin;²⁵⁷ reduction and elimination of customs barriers;²⁵⁸ non-tariff barriers;²⁵⁹ intra-community transit facilities;²⁶⁰ customs operation;²⁶¹ simplification and harmonisation of trade documents and procedures;²⁶² trade promotion;²⁶³ re-export of

²⁵³ See above, art 6(2)(c).

²⁵⁴ See above, art 6(2)(d).

²⁵⁵ See above, art 6(2)(e).

²⁵⁶ See above, art 6(2)(f).

²⁵⁷ See above, art 33.

²⁵⁸ See above, arts 29 & 30.

²⁵⁹ See above, art 31.

²⁶⁰ See above, art 38.

²⁶¹ See above, art 39.

²⁶² See above, art 40.

goods;²⁶⁴ and free movement of persons, right of residence, and right of establishment.²⁶⁵ It also addresses food and agriculture;²⁶⁶ industry;²⁶⁷ science and technology;²⁶⁸ energy and natural resources;²⁶⁹ environment;²⁷⁰ transport, communication, and tourism;²⁷¹ education, training, and culture;²⁷² human resources, social affairs, health, and population;²⁷³ standardisation, quality assurance, and measurement systems;²⁷⁴ and solidarity, development, and cooperation fund.²⁷⁵

Most of the sectoral issues herein highlighted required the adoption of specific measures by States Parties for their realization. The provision on free movement of persons, for example, reads: “Member States agree to adopt, individually, at bilateral or regional levels, the necessary measures, in order to achieve progressively the free movement of persons, and to ensure the enjoyment of the right of residence and the right of establishment by their nationals within the Community”.²⁷⁶ The “necessary measures”

²⁶³ See above, art 42.

²⁶⁴ See above, art 38.

²⁶⁵ See above, art 43.

²⁶⁶ See above, arts 46 & 47.

²⁶⁷ See above, arts 48-50.

²⁶⁸ See above, arts 51-53.

²⁶⁹ See above, arts 54-57.

²⁷⁰ See above, arts 58-60.

²⁷¹ See above, arts 61-66.

²⁷² See above, arts 68-70.

²⁷³ See above, arts 71-76.

²⁷⁴ See above, art 67.

²⁷⁵ See above, arts 80 & 81.

²⁷⁶ See above, art 43(1).

certainly include legislative enactment, though this is by no means exhaustive of the obligations of states.²⁷⁷

NEPAD represents Africa's current effort to redress the continent's underdevelopment and poverty. Mwanza frightfully describes NEPAD as Africa's "last hope".²⁷⁸ It makes poverty eradication "a pressing duty",²⁷⁹ and notes, somewhat solemnly, that "African leaders have learned from their own experiences that peace, security, democracy, good governance, human rights and sound economic management are conditions for sustainable development. They are making a pledge to work, both individually and collectively, to promote these principles in their countries and subregions and on the continent".²⁸⁰ Though not a legally binding instrument, NEPAD serves as an additional source of inspiration for the AU.

As a Strategic Policy Framework and socio-economic development program of the AU, NEPAD seeks to arrest and reverse the steady decline in Africa's economic performance. It develops a strategy for poverty eradication,²⁸¹ including working with IFIs and UN agencies "to accelerate the implementation and adoption of the

²⁷⁷ Cf CESCR General Comment 3 'The Nature of State Parties' Obligations (art 2(1) para 1 of the Covenant)' (5th session 1990) para 4 UN Doc E/1991/23 [hereinafter CESCR General Comment 3] *reprinted in* Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies at 18 UN Doc HRI/GEN/1/Rev 5 (2001).

²⁷⁸ S Mwanza 'NEPAD is Last Hope for Africa—Magande' *Times of Zambia* 14 Sept 2004 available at <http://www.times.co.zm/> (search "Search the Site" for "nepad is last hope") (quoting Ng'andu Magande, Zambia's Finance and National Planning Minister).

²⁷⁹ NEPAD (note 116 above) para 1.

²⁸⁰ Above, para 71.

²⁸¹ Above, paras 4–5.

Comprehensive Development Framework, the Poverty Reduction Strategy and related approaches”.²⁸²

The proliferation of regional economic instruments and institutions in Africa testifies to Africa’s longstanding recognition of the needs and benefits of economic integration. The RECs, LPA/FAL, AEC Treaty, AU Act, NEPAD, and similar instruments show clearly that Africa has mapped out its strategy for regional economic cooperation and integration. These instruments have been elaborated largely to encourage development, aid industrialisation, and enlarge Africa’s participation in the global economy.²⁸³ Regional integration is the Chinese wall that will keep the tides of globalisation at bay. Properly implemented, integration policies could lead to “sustainability, increased investment, the consolidation of economic and political reforms, increased global competitiveness, the promotion of regional public goods, [and] the prevention of conflict”.²⁸⁴ Cooperative regimes also embody, at the civilisational level, commitments to democratic and pluralistic politics.²⁸⁵ Integration and cooperation will also serve as “building blocks on which future intra-Africa trade, investment and economic co-operation can be based”.²⁸⁶

²⁸² Above, para 119.

²⁸³ See CSSDCA Declaration (note 168 above) para 13(a); MA Echols ‘Regional Economic Integration’ 31 *International Lawyer* (1997) 453 (discussing the expanding geographical and substantive coverage of free trade areas, customs unions, and common markets and describing the expanding web of overlapping regions).

²⁸⁴ AO Konaré & KY Amoako ‘Foreword’ in *ECA Assessing Regional Integration* (note 225 above) x. See also D Brown ‘The Role of Regional Organization in Stopping Civil Wars’ 41 *AFL Review* 235 (1997) (examining the new role of regional organizations in resolving conflicts, observing: “The newfound acceptance by the international community of regional action to stop civil wars has resulted in the formation of new norms in international law and relations;” as above 266).

²⁸⁵ SP Huntington *The Clash of Civilizations and the Remaking of World Order* (1996) 302.

²⁸⁶ CSSDCA Declaration (note 168 above) para 13(a).

In the Yaoundé Declaration, the OAU agreed that regional cooperation and economic integration help to promote the economies of scale and, thus,

constitute the best means for Africa to regain its lost external competitiveness, to strengthen its capacity of negotiation in world affairs, to effectively open up its economies, to rapidly launch its industrial growth and enter the world market through diversification of exports, comparative advantages other than commodities and ultimately mitigate its marginalization.²⁸⁷

In the Algiers Declaration of 1999, the OAU further stated:

We, for our part, strongly believe that the promotion of economic co-operation and integration for the establishment of the [AEC] as provided for under the Abuja Treaty will help consolidate the efforts being deployed by our countries to revive and develop their economies and to address the major problems facing Africa, notably problems of refugees and poverty, illiteracy and pandemics including the scourge of AIDS, as well as environmental problems, namely water and desertification related issues and threats to bio-diversity.²⁸⁸

²⁸⁷ Yaoundé Declaration (note 59 above) para 14. See also para 13 (further arguing: “Regional cooperation and economic integration ... are equally very essential not only for the self-fulfilment of the continent but also for securing an appropriate place in a world economy characterized, inter-alia, by a generalized wave of fundamental economic restructuring of economic entities spaces, oriented towards achieving a real continentalization of markets, and intensification and liberalization of trade and commerce”).

²⁸⁸ Algiers Declaration OAU Assembly 35th Ord Sess OAU Doc AHG/Decl1 (XXXV) (July 1999) [hereinafter Algiers Declaration].

There are 15 landlocked countries in SSA²⁸⁹ and none of them has a chance to develop in the absence of a ready access to the coast with efficient low-cost infrastructure. Such access can come mainly through regional integration.²⁹⁰ Asante has also written that “a continent with over 600 million inhabitants scattered over fifty fragmented, balkanized, independent, and sovereign entities cannot be taken seriously as an important and effective partner in the global economy”.²⁹¹ NEPAD itself acknowledges as much:

Most African countries are small, both in terms of population and per capita incomes. As a consequence of limited markets, they do not offer attractive returns to potential investors, while progress in diversifying production and exports is retarded. This limits investment in essential infrastructure that depends on economies of scale for viability. These economic conditions point to the need for African countries to pool their resources and enhance regional development and economic integration on the continent, in order to improve international competitiveness.²⁹²

The essential question is why has integration remained a beautiful utopian dream in Africa? Why have Africans been led into tantalizing glimpses, promises never quite fulfilled, echoes that died away just as they caught one’s ear? Many factors account for this glitch. Principally, African states are unwilling to surrender the degree of controls

²⁸⁹ See *Investing in Development* (note 160 above) 156.

²⁹⁰ Above (arguing that regional integration is “important in achieving scale economies in infrastructure networks, such as electricity grids, large-scale electricity generation, road transport, railroads, and telecommunications;” as above).

²⁹¹ SKB Asante *Regionalism and Africa’s Development: Expectations, Reality and Challenges* (1997) 10.

over their financial and economic affairs that are indispensable for integration.²⁹³ Otherwise stated, states are unwilling to concede their sovereignties. For example, States Parties to the AEC Treaty routinely take unilateral measures over the Community legal system that they voluntarily accepted on the basis of reciprocity, indifferent to the fact that such measures jeopardise the attainment of the Treaty objectives and, *a fortiori*, the AU Act. As Ghaddafi recently reflected:

We do not accept diminished sovereignty and interference in our internal affairs from others, not even for the sake of the unity of Africa. But our national sovereignty is violated and threatened by the lack of African unity. That is why we agree to compromise our sovereignty to foreign powers and we accept this as a matter of fact. But when we talk about compromising any part of our collective sovereignty for the sake of the [AU], we say “no, we will not compromise our sovereignty”. So, we have sovereignty without unity.²⁹⁴

The AU should stop brooding over marginalisation in globalisation; it should urge its Member States to pool their sovereignties in order to gain strength. Some sacrifices are necessary to actualise the AEC and maximise potentials of regional economic

²⁹² NEPAD (note 116 above) paras 93-94.

²⁹³ See G Naldi & K Magliveras ‘The African Economic Community: Emancipation for African States or Yet Another Glorious Failure?’ (1999) 24 *North Carolina Journals of International and Commercial Regulation* 601 630; NJ Udombana ‘A Harmony or a Cacophony? The Music of Integration in the African Union Act and the New Partnership for Africa’s Development’ (2002) 13 *Indiana International and Comparative Law Review* 185 202 (stressing that many African states “are not prepared to subordinate immediate national political interests to long-term regional economic goals or to cede essential elements of sovereignty to regional institutions”).

²⁹⁴ Welcome address by Muammar Ghaddafi of Libya to the Fifth Ordinary Session of the African Union (AU) Assembly in Sirte Libya in July 2005 *New African* Aug/Sept 2005 31 33.

cooperation. The current IEO will be no less unjust or unfair in the immediate future. Globalisation, as conceived by the North and delivered in the South, is not a bowl of cherries; it is a rat race where the end justifies the means.²⁹⁵

One of the critical issues that the AU should address is free movement of persons, which entails the right of “community citizens” to be treated in the host member state free from discrimination on grounds of nationality.²⁹⁶ The AU should pressurise its Member States to make genuine efforts towards removing roadblocks to the free movement of persons. Free movement of persons is an essential element of economic integration and an imperative for the accomplishment of the AEC’s goals.²⁹⁷ Its importance lies in its content and in the promise it holds out for the future.²⁹⁸

“Community citizenship” is one of the fundamental freedoms of EU Law;²⁹⁹ and the EU has promoted citizenship through many regulations³⁰⁰ and directives.³⁰¹ These secondary legislations have created further categories of persons who are entitled to free

²⁹⁵ See Udombana ‘A Question of Justice’ (note 139 above) 1203.

²⁹⁶ See J Steiner & L Woods *Textbook on EC Law* (2003) 189.

²⁹⁷ See B Thompson ‘Economic Integration Efforts in Africa: A Milestone—The Abuja Treaty’ (1993) 5 *African Journal of International and Comparative Law* 743 753–54.

²⁹⁸ *Contra* D O’Keeffe ‘Union Citizenship’ in D O’Keeffe & P Twomey (eds) *Legal Issues of the Maastricht Treaty* (1994) 87 106.

²⁹⁹ See eg Case C-85/96 *María Martínez Sala v Freistaat Bayern* 1998 ECR I-2691 (ruling that EU-citizens have a right to equal treatment); Case 53/81 *Levin v Staatssecretaris van Justitie* 1982 ECR 1035. See, in general, C Closa ‘The Concept of Citizenship in the Treaty on European Union’ (1992) 29 *Common Market Law Review* 1137 (evaluating, from a political point of view, the condition of citizenship created by the EU Treaty).

³⁰⁰ See eg Council Regulation 1612/68 Freedom of Movement for Workers Within the Community 1968 OJ (L 257) 2 (EC) as amended by Council Regulation 2434/92 1992 OJ 1992 (L 245) 1.

³⁰¹ See eg Council Directive 73/148 Abolition of Restrictions on Movement and Residence Within the Community for Nationals of Member States with Regard to Establishment and the Provision of Services 1973 OJ (L 172) 14 (EC); and Council Directive 75/34 Concerning the Right of Nationals of a Member State to Remain in the Territory of Another Member State After Having Pursued Therein an Activity in a Self-employed Capacity 1975 OJ (L 14) 10 (EC).

movement, such as retirees, students and persons of independent means.³⁰² For Africa, especially, the mobility of workers could stimulate the human resource response to the requirements of employment market, promote mutual understanding, and create the social fabric essential to the emergence of a real, rather than an imaginary, “African Union”. The AU should take appropriate measures, such as suspension of membership, to penalise any Member State that fails to implement commitments under the AEC Treaty thereby causing a breach of AEC’s functioning.

Barriers against free movement of goods, labour, capital and payments, services and the right of enterprises to establish themselves in another Member State are inimical to sustainable development and poverty eradication. It is no use preaching pan-Africanism if it is easier, as is presently the case, for an African to travel to Europe from his country than to cross the border of his country to a neighbouring African state for legitimate transactions. It takes a Nigerian between three and six months to obtain an exit visa to Kenya, all things being equal;³⁰³ whereas it will take the same Nigerian not more than one week to obtain an exit visa to Switzerland, again all things being equal.³⁰⁴ What manner of African unity or union is this? The absence of free movement of persons between Africa’s sub-regions has forced many Africans to look outwards.³⁰⁵

The solution to these constraints is not to pretend that they do not exist; the solution lies in admitting and confronting them. Of course, states have inherent rights to take

³⁰² See TC Hartley *European Union Law in a Global Context* (2004) 408.

³⁰³ Based on experiences of Nigerians whom this author interviewed. Cf R Sankore ‘Africa: Killing Us Softly’ *New African* Nov 2005 9 12 (“Africans from some countries have to wait for over a month for a mere visitor’s visa to other parts of Africa In practice many are even completely excluded.”).

³⁰⁴ Based on author’s personal experiences.

³⁰⁵ Sankore (note 303 above) 12 (quoting Chidi Odinkalu).

restrictive measures to derogate on right of entry and residence, on grounds such as public policy, security, or health, but states should refuse entry or residence solely on the personal conduct of the individual concerned and not on economic grounds. The conduct that should justify denial of entry should be such that nationals are also punishable when they exhibit them, based on the principle of equality of treatment. Furthermore, restrictive measures should not be collective or reflect a wish to achieve general exclusion.

A continent that is moving towards economic and political integration must adopt common positions on issues that are vital to integration and sustainable development. The AU cannot leave certain matters to the discretion of individual Member States. It should, for example, rationalise the several protocols that dot Africa in order to align them to continental objectives and secure the eventual convergence of sub-regional goals.³⁰⁶ It should rationalise its institutions and synergise its protocols with those of the AEC and RECs in order to build and strengthen them for political, economic and social integration. The RECs, on their part, should implement mechanisms that ensure a more expeditious approach to ratifying protocols. Sound macroeconomic policies and increased investment in infrastructure will trigger a positive response from the private sector and increase the scope of the market that accompanies an operating presence in Africa.³⁰⁷ These are some of the imperatives for an effective regional integration.

The ECA believes that NEPAD should drive integration in Africa, by “working with the [RECs] to coordinate efforts and to mobilize and pool resources to strengthen

³⁰⁶ ECA *Assessing Regional Integration* (note 225 above) 3. Cf Ghaddafi (note 294 above) 33 (calling on African states to give the issue of ratification of protocols a priority).

³⁰⁷ See *Investing in Development* (note 160 above) 156.

Africa's physical integration."³⁰⁸ This is an arguable proposition. The present writer takes the view that reviving and nurturing the AEC project is a sure route towards reducing Africa's inequitable trading relationship with the North, lessening its reliance on foreign aid, and facilitating the development of Africa's tremendous natural resources. Africa, by culture, is a group-oriented society; what it needs is to extend this civilisation to the level of economics and development politics in order to lift the masses from endemic poverty.

The twenty-first century is one of technologically-driven industrialisation. Africa must also rise to the challenge of information and communications technology (ICT). It's continued reliance on raw materials and energy exports for growth is patently short-sighted. Governments must increasingly apply technology to support agriculture in order to produce sufficient food for domestic consumption and export. A country has no claim to any kind of sovereignty if it cannot feed its population. It is really a scandal that a continent that is most climatically suited for food production in the world is today a net importer of food and "currently the largest recipient of food aid in the world".³⁰⁹ Africa should also decolonise the universities through massive support for self-reliant research in all fields of human endeavour, especially in ICT.³¹⁰

3.4 Conclusion

This chapter has identified the various endogenous and exogenous challenges that confront and constrain African states in their attempts to meet the twin demands of

³⁰⁸ ECA *Assessing Regional Integration* (note 225 above) 4.

³⁰⁹ Declaration on Agriculture and Food Security in Africa AU 2d Ord Sess AU Doc Assembly/AU/Decl7 (II) (July 2003) pmb1 [hereinafter Declaration on Agriculture & Food Security].

³¹⁰ See Okigbo (note 201 above) 36-7.

development and human security. Of course, the failure to provide a better life for Africans is not for want of attempts by post-independent inheritance elites and others.³¹¹ The real impediments are the old ones: the absence of capacity and accountability. Africa's economic resources are enough for Africa's needs, but they are not enough for some of its leaders' greed. Given a prudent management of these resources, it is possible for every child in Africa to have a free primary and secondary education and for every family to meet its nutritional needs. African leaders themselves affirm this proposition:

The resources, including capital, technology and human skills, that are required to launch a global war on poverty and underdevelopment exist in abundance [in Africa], and are within our reach. What is required to mobilise these resources and to use them properly, is bold and imaginative leadership that is genuinely committed to a sustained human development effort and poverty eradication.³¹²

Africa should entrench the human dimension in all its development policies, since every action and pursuit aims at some good. The primary end and the principal means of development is the expansion of human freedom.³¹³ This idea—that people are the real wealth of nations—was reflected in the writings of Aristotle, Immanuel Kant, Adam Smith, Robert Malthus, and John Stuart Mill, to mention a few. Immanuel Kant argued

³¹¹ Cf Yaoundé Declaration (note 59 above) para 7 (“Africa’s plight is not, since independence, imputable to lack of ideas, anticipation, proposals, individual and collective efforts on the part of our countries, plans, strategies as well as decades devoted to Africa by the international community.”).

³¹² NEPAD (note 116 above) para 6 (italics supplied).

³¹³ See DRD (note 133 above) pmb1 & art 2(1) (stressing that humanity must remain the central subject, the main participant and the beneficiary of the development process); and A Sen *Development as Freedom* (1999) xii 36.

that human beings should be seen as ends, rather than as a means to other ends.³¹⁴ Humanity, thus, must be the objective and supreme beneficiary of development, else development becomes a meaningless vanity and vexation of the spirit. As the UN Economic and Social Council (ECOSOC) maintained:

[C]omprehensive development cannot be fully achieved until the impoverished have gained access to the essential attributes of dignity; a goal that can be achieved only by combating all forms of destitution and marginalization and making enhanced solidarity among all members of the national community an essential basis for all the reforms introduced.³¹⁵

The now defunct OAU expressed the same sentiment in its 1996 Yaoundé Declaration: “Sustainable development aims primarily at ensuring a better standard of living for present and future generations... [It] is founded on democracy, human rights, good governance, human resource promotion, economic and social development, environmental protection, all with the human being, as the focal point.”³¹⁶ Africa should translate such rhetoric into reality by uniting economic and social policies to spread protection against poverty to everyone. Indeed, every society must work in a deliberately

³¹⁴ See I Kant *Political Writings* (Hans Reiss ed 1991) 23.

³¹⁵ UN Economic & Social Council [ECOSOC] *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant* UN Doc E/1990/6/Add 14 (8 Oct 1996) para 5 available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.1990.6.Add.14.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1990.6.Add.14.En?Opendocument).

³¹⁶ Yaoundé Declaration (note 59 above) para 19.

and carefully structured way to ensure the full enjoyment of human rights by all its members.

The deprivations of elementary capabilities that many Africans experience call for public action to assist the deprived. Poverty is more severe in rural than in urban Africa. The reason is that “[h]ouseholds in remote areas, living on fragile lands, would be expected to have fewer opportunities and face greater risks and vulnerability than households in better-endowed areas”.³¹⁷ Addressing spatial poverty depends on how states allocate resources to the poor—health, education, water and sanitation, and energy.³¹⁸ It also depends on proper management of public finances, which is presently lacking in the majority of African countries, due to corruption and mismanagement of resources. Africa’s governments should devise specific policies and programmes aimed at ensuring respect for, and fulfilment of, socio-economic rights. The hope for survival, security, and contentment requires governments to direct their resources to the most urgent needs.

³¹⁷ United Nations Economic Commission for Africa *Economic Report on Africa 2003: Accelerating the Pace of Development* UN Sales No E03IIK1 (2003) 5.

³¹⁸ Above, 6.

Chapter Four

SOCIO-ECONOMIC RIGHTS AND THE JUDICIAL PROCESS

4.1 Introduction

Any discourse on the effective realisation of socio-economic rights in Africa must necessarily interrogate the role of judicial institutions in such an enterprise. This thesis is not about abandoning the judicial route; it is about reforming and transforming that route to enhance the full enjoyment of human rights. Assigning a role for the judiciary in human rights implementation agenda ensures that states live out their positive obligations to fulfil socio-economic rights beyond what the political and administrative organs are prepared to concede on their own accord.¹ The concept of an obligation might lose much of its force if there is no notion of a sanction for failure to comply.² The consciousness of ‘the judge over your shoulder’ reinforces the awareness and operationalisation of standards of behaviour.³ Utilising the judicial forum to articulate

¹ See ‘The Domestic Application of the Covenant’ Committee on Economic, Social and Cultural Rights (CESCR) General Comment 9 UN Doc E/C12/1998/24 3 Dec 1998 para 10 [hereinafter General Comment 9]. Cf AA An-Na’im ‘To Affirm the Full Human Rights Standing of Economic, Social & Cultural Rights’ in Y Ghai & J Cottrell (eds) *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights* (2004) 7 15 [hereinafter *Economic, Social & Cultural Rights in Practice*] (“[A]n ESCR to shelter is not a human right at all if its provision is entirely left to the political and administrative will of the state, without any possibility of independent judicial supervision and guidance...”).

² See J Cottrell & Y Ghai ‘The Role of the Courts in the Protection of Economic, Social & Cultural Rights’ in *Economic, Social & Cultural Rights in Practice* (note 1 above) 58 60.

³ As above, 65.

demands also serves as an effective part of a wider public education and mobilization campaign.⁴

This Chapter's thesis is that Africa's judiciaries have equal responsibilities to address the vast poverty and misery in Africa through context-sensitive interpretations of relevant human rights instruments, both local and international. It urges these institutions—constitutional courts properly so-called (like the South African Constitutional Court), civil courts having jurisdictions over human rights guarantees, and quasi-judicial human rights institutions such as the African Commission on Human and Peoples' Rights⁵—to be more forceful and dynamic in advancing socio-economic rights. Such a call raises a number of questions. Do courts have the skills necessary to grapple with the complexities of resource allocations in a polity? How can these institutions promote socio-economic rights without assuming the critical decisions that go to the heart of the political process? Answering these questions turns largely on the methodology for the interpretation of guaranteed or even unincorporated rights.

I start by highlighting the nature of judicial function, followed by a close examination of interpretive methodology for the advancement of socio-economic rights in Africa. This approach admits of certain inherent limitations, which I take up in the last segment.

⁴ JM Woods 'Emerging Paradigms of Protection for "Second-Generation" Human Rights' (2005) 6 *Loyola Journal of Public Interest Law* 103 104 (adding: "Litigation strategies can also advance popular understanding of the inherent limitations of advocacy within legal frameworks and the need for more far-reaching solutions.").

⁵ High courts generally adjudicate most constitutional issues in Africa—including human rights—with the supreme courts exercising appellate jurisdictions. In states having both high courts and constitutional courts, the jurisdiction of the latter is usually exclusive and where constitutional questions arise in other courts, such questions are normally referred to the constitutional court while proceedings at the high court are suspended. See CJ Antieau *Adjudicating Constitutional Issues* (1985) 1.

4.2 The Judicial Function

The political theory and constitutional doctrine of separation of powers has become almost a universal axiom, though many governments in Africa still grapple with its practicalities. This doctrine is based on the division of governmental powers through some scheme of allocation of authority. The legislature is allocated the primary responsibility for law-making; implementation of laws and formulation of national development programmes lies with the executive; and the judiciary interprets the laws in the course of arbitrating disputes.⁶ To this general proposition must be added a caveat that, in most of Africa, it is the executive that controls the legislative initiative. For states with parliamentary democracies, “ministers are members of the legislature and are thereby in a position to lead and control it.”⁷

Separation of powers serves as an indirect limitation on governmental power, by making governmental cohesion difficult.⁸ It is as an important pillar of democratic governance and the rule of law and one that better protects individual liberties.⁹ In his dissenting opinion in *Mayers v US*,¹⁰ Justice Brandeis, referring to the US Constitution of 1787, stated: “The doctrine of the separation of powers was adopted ... not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid

⁶ See eg Nigerian Constitution 1999 secs 4 5 & 6 respectively.

⁷ BO Nwabueze *Judicialism in Commonwealth Africa* (1977) 49.

⁸ See FR Strong *Judicial Function in Constitutional Limitation of Governmental Power* (1997) 7 (arguing: “Such diffusion of conceded authority should result in the lessening of arbitrary official conduct”).

⁹ As above.

¹⁰ *Mayers v US* 272 US 52 (1926).

friction, but, by means of the inevitable friction incident among the three departments, to save the people from autocracy”.¹¹

As one of the vital organs of government, the judiciary exercises judicial power, defined as “the power which the state exerts in the administration of public justice, in contradistinction from the power it possesses to make laws and the power of executing them”.¹² Constitutionalism entails limitations on governmental powers and judicialism makes those limitations possible. The judiciary has “a separate procedure comprising a separate agency and personnel for an *authoritative* interpretation and enforcement of [law]”.¹³ One of its functions is to strike “a balance between the individual’s freedom and the right of the state to self preservation”.¹⁴

Judicialism is “the backbone of constitutionalism, the practical instrument whereby constitutionalism may be transformed into an active idea in government; it is our best guarantee of the rule of law and therefore of liberty”.¹⁵ Judicialism requires judicial independence, which enables judges to say “no”—“no” to legislators, presidents, governors, municipal or local authorities, in short, “no” whenever “the needs of the political moment clash with constitutional guarantees”.¹⁶ Judicialism also serves as a legitimating force on governmental acts on occasions when courts hold challenged governmental measures valid or constitutional.

¹¹ As above, 9.

¹² *Huddart, Parker & Co Ltd v Moorehead* (1909) 8 CLR 330 383 *per* Justice Isaacs.

¹³ BO Nwabueze *Constitutionalism in the Emergent States* (1973) 14 (italics in the original).

¹⁴ BO Nwabueze *Judicialism in Commonwealth Africa* (note 7 above) 139.

¹⁵ Above, xi.

¹⁶ The Hon MH Marshall ‘Speech: ‘Wise Parents do not Hesitate to Learn from their Children’: Interpreting State Constitutions in an Age of Global Jurisprudence’ (2004) 79(5) *New York University Law Review* 1633 1639.

The judiciary function is basically twofold: One is constitutional or statutory interpretation, that is, “the determination of legislative intent in formulation of policy;”¹⁷ the other is executive oversight, that is, “the bounding within rationality of discretion in the administration of law.”¹⁸ These two functions—the interpretive and non-interpretive—deserve brief introductions, though, as one commentator argues, what courts do in the law of judicial review is not something quite distinct from statutory interpretation.¹⁹

4.2.1 Constitutional Interpretation

A Constitution is the foundational norm of the legal system. It is a protocol of survival and continuity for any social grouping, ensuring that no one attains salvation or offers a program of salvation to the populace by another route. It provides a sense of citizenship, dignity and personality to all citizens and sets forth the general parameters of legislative, executive, and judicial powers. A Constitution embodies not only the fundamental principles of humanity but also the fundamental rights under the law. Constitutional interpretation,²⁰ for Nwabueze, is “the most vital factor in constitutional government”,²¹ but interpretation is a corollary of law-making and, hence, the function of the political

¹⁷ Strong (note 8 above) 12.

¹⁸ As above.

¹⁹ M Hunt *Using Human Rights Law in English Courts* (1998) 129.

²⁰ The word ‘constitution’ is used holistically in this chapter to include international human right instruments that are equally subject to interpretations.

²¹ Nwabueze *Judicialism in Commonwealth Africa* (note 7 above) 139.

organs.²² Although courts do engage in policymaking by interpreting vague constitutional and statutory provisions, interpretation is not their primary function.

Courts interpret the constitution or other enactments only in the exercise of their judicial functions and as a last resort, “when impelled by the necessity of deciding ordinary adversary litigation between individual parties”.²³ The rationale is to prevent them from usurping the supreme role of the legislature²⁴ and attributing to themselves the primary power to receive, review and revise all legislative acts.²⁵ This assumption probably explains why the African Charter, which gives the African Commission the mandate to interpret its provisions, provides that the Commission’s mandate must be exercised “at the request of a State Party, an institution of the OAU [now AU] or an African organization recognized by the AU”,²⁶ thus underscoring the political nature of interpretation.

4.2.2 *Judicial Review*

Judicial review is a self-imposed responsibility that is rooted in the Lockian creed. The partisan conflict that culminated in Thomas Jefferson’s election in 1800 provided the opportunity for Chief Justice Marshall to establish and institutionalise the meliorative

²² See above, 50-51 (“[T]he interpretative function [of the legislature] is necessarily implied in its power to make laws. Every legislative act is an interpretative determination by the legislature that the act is within its powers under the constitution”).

²³ As above, 51.

²⁴ Harzard defines a ‘legislature’ to mean “a body whose chief function in government is to formulate general rules of law that primarily reflect the notions of utility and value held by its members.” GC Hazard ‘The Supreme Court as a Legislature’ (1978) 64 *Cornell law Review* 1 2.

²⁵ See Nwabueze *Judicialism in Commonwealth Africa* (note 7 above) 51.

²⁶ African Charter art 45(3).

role of the judiciary. In the famous case of *Marbury v Madison*,²⁷ Marshall asserted: “It is, emphatically, the province and duty of the judicial department to say what the law is.” Marshall justified federal courts’ power to ignore enacted laws that were inconsistent with the Constitution on the ground that such laws fell outside the delegation of authority by the people to the government, as expressed in the Constitution.²⁸ Judicial review, thus, removes issues of executive policy to the realm of adjudication.²⁹

Critiques of judicial review insist that it is an act of judicial usurpation or, at best, a “bald effrontery;”³⁰ and that “given the principle of electorally accountable policymaking, all noninterpretive judicial review is illegitimate.”³¹ They argue that legislatures should legitimately resolve controversial issues, since courts are undemocratic and lacking in “the passive virtues”.³² In his dissenting judgment in *Eakin v Raub*,³³ Justice Gibson maintained that judicial review violates the doctrine of separation of power and that “the construction of the constitution in this particular belongs to the legislature, which ought therefore to be taken to have superior capacity to judge of the

²⁷ *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

²⁸ As above, 176 (“That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected”).

²⁹ See L Hartz *The Liberal Tradition in America* (1955) 16 (stressing that judicial review “implies a prior recognition of the principles to be legally interpreted”).

³⁰ Strong (note 8 above) 21.

³¹ M Perry *The Constitution, the Courts, and Human Rights* (1982) 37. Cf A Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 19 (“[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguished characteristic of the system. Judicial review works counter to this characteristic.”).

³² See A Bickel ‘The Passive Virtues’ (1961) 75 *Harvard Law Review* 40.

³³ *Eakin v Raub* 12 Seg & R (PA) 330 (1825).

constitutionality of its own acts”.³⁴ Michael Perry writes that “[i]f judicial review does not run counter to the principle of electorally accountable policymaking, it is at least in serious tension with it”.³⁵

Judicial review is probably the most puzzling of US cultural phenomena, but it is also perhaps the most admired feature of US constitutionalism.³⁶ It is also a feature of many constitutional arrangements in Africa and elsewhere. Its overriding virtue and justification “is to guard against governmental infringement of individual liberties secured by the Constitution”.³⁷ Regrettably, its fruits have been as varied as the types of regimes in which it has been institutionalised.³⁸ Even those who invented the notion have not always exercised a good conscience in its application to advance the rights of minorities. Often, those who most loudly clamour for liberty do not most likely grant it.

The *Dred Scott* case³⁹ was one of several examples where the power of judicial review was of little assistance. There, the Supreme Court sanctioned the system of slavery and racism that existed until the civil war, abandoning the aspirational component of the US Declaration of Independence to the effect that all men are born equal. *Plessy v*

³⁴ As above, 350.

³⁵ Perry (note 31 above), 9.

³⁶ See, in general, SB Prakash & JC Yoo ‘The Origins of Judicial Review’ (2003) 70 *University of Chicago Law Review* 887.

³⁷ J Choper *Judicial Review and the National Political Process: A Functional Reconsideration of the Supreme Court* (1980) 64.

³⁸ See GJ Jacobsohn *Apple of Gold: Constitutionalism in Israel and the United States* (1993) 112 (stressing, “a critical factor in any comparative assessment of the institution [of judicial review] will be the extent to which a consensus may be said to exist with respect to a society’s defining political principles”).

³⁹ See *Scott v Sandford* 60 US 393 (1856).

Ferguson,⁴⁰ which followed *Dred Scott*, legitimised racial desegregation in schools, notwithstanding the American Bill of Rights. It took 58 years of struggle—post *Plessy v Ferguson*—for the US Supreme Court to recognize the legitimate rights claim of African-Americans to equal educational opportunities—in *Brown v Board of Education of Topeka*.⁴¹

To be relevant, judicial review must be consistent with the overriding obligation of governmental officials to promote the progressive realization of those principles that gave definition to the nation. Those sworn to uphold the constitution have an obligation to advance the cause of constitutional principles.⁴² The rest of this chapter explores the theoretical and practical approaches to the realization of socio-economic rights in Africa through the judicial process.

4.3 Interpretive Methodologies for the Advancement of Socio-economic Rights

Many past democracies believed that the “self-restraint of the majority” would preserve the delicate balance between majority rule and respect for human rights, but the 20th century atrocities shattered that dream, hence the imperative for written constitutions in the post-World War II era. These constitutions incorporate written bill of rights, understandably because “the best legal guarantees of rights are the provisions in national constitutions which cannot be changed, or not without great effort.”⁴³ The underlying,

⁴⁰ *Plessy v Ferguson* 163 US 5370 (1896) (legitimising racial desegregation). See, in general, LWH Ackermann ‘Constitutional Protection of Human Rights: Judicial Review (1989) 21 *Columbia Human Rights Law Review* 59.

⁴¹ See *Brown v Board of Education of Topeka* 348 US 886 (1954).

⁴² See Jacobsohn (note 38 above) 118.

⁴³ Cottrell & Ghai (note 2 above) 66.

albeit untested, assumption is that the constitutionalisation of rights is a necessary prerequisite, if not a sufficient condition, for their actual protection.⁴⁴

As Chapter One indicated, most African states have ratified or acceded to several universal and regional human rights treaties, including the ICESCR and the African Charter and many have domesticated these instruments, though such an exercise is not required of monist states. Many have made provisions for bills of rights, either as parts of their constitutional provisions or separately. Since remedies are at the heart of human rights protection regimes, most constitutions provide for an independent judiciary, with power to interpret and enforce human rights.⁴⁵ (Many constitutions, indeed, regard courts as primary guardians of fundamental rights.⁴⁶) The Constitution of Ghana provides:

Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.⁴⁷

⁴⁴ See R Hirschl ““Negative” Rights vs. “Positive” Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order” (2000) 22 *Human Rights Quarterly* 1060 1061.

⁴⁵ See eg Alg Const sec 139 (guaranteeing that the judicial power will safeguard fundamental rights); Angl Const secs 120–21 (requiring courts to guarantee protection of the rights of citizens). See, in general, C Heyns ed *Human Rights Law in Africa vol 2* (2004).

⁴⁶ See eg Burundi (2001), sec 52; Central African Republic (1995), sec 78; Chad (1996), sec 148; Comoros (2001), sec 31; Congo (2001), sec 135; Djibouti (1992), sec 71; Equatorial Guinea (1991), sec 95(b); Gabon (1991), sec 83; Gambia (1997), sec 132(1)(b); Ghana (1993), sec 33(1); Mali (1993), sec 85; and Togo (1882), sec 99.

⁴⁷ Ghana Const sec 33(1).

The Constitution of Ghana also authorizes the High Court to issue such directions or orders, as it may consider appropriate, for purposes of enforcing or securing the enforcement of human rights.⁴⁸

A judicial approach to the advancement of socio-economic rights in Africa must take these developments as points of departures, especially as most constitutions commit judges to keep faith with constitutional provisions.⁴⁹ In general, the judicial approach to the interpretation of rights will depend on different contexts, for example, whether a particular right is directly or indirectly enforceable and whether a right recognised at the international level is also recognised at the municipal level. The present writer takes the view that, irrespective of the context, courts can advance socio-economic rights in Africa through creative and extraterritorial interpretations.

4.3.1 *Interpreting Directly Enforceable Rights*

Where a constitution expressly guarantees socio-economic rights, as with the South African Constitution, the question is not whether they are justiciable, but how to implement them in a given case. The role and commitment of all actors—state and non-state—in the society will dictate the level of implementation.⁵⁰ The role of the judiciary in the implementation of these rights largely depends on the interpretive methodology

⁴⁸ Above, sec 33(2). Such orders may include *habeas corpus*, *certiorari*, *mandamus*, prohibition, and *quo warranto*. Above.

⁴⁹ See eg South African Constitution 1996 Schedule 2 (Oaths and Solemn Affirmations) (providing: “I swear that, as Judge of the Constitutional Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the Law. So help me God”).

⁵⁰ See, in general, V Govender ‘Economic, Social and Cultural Rights in South Africa: Entitlements, Not Mere Policy Options’ in BK Goldewijk *et al* (eds) *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (2002) 75.

employed. In interpreting constitutionally guaranteed rights, the judiciary must determine, first, the meaning and scope of the guaranteed rights and, second, whether a challenged law or conduct conflicts with those rights.

A constitution is not merely composed of a closed set of clear-cut rules; it deals with lofty ideals and principles. Many constitutional provisions are specific, like the qualifications for elective positions; others are not, but contain open-ended words like “equality” or “liberty”, words that permit some interpretive latitude. A constitution lays down, in Dworkin’s words, “general, comprehensible moral standards that government must respect but ... leaves it to statesmen and judges to decide what these standards mean in concrete circumstances”.⁵¹ Deciding what these standards mean involves value choices and requires a genuine interpretation of enshrined rights.

In determining the meaning and scope of guaranteed rights, a constitutional court should constantly remind itself that a constitution is not a document frozen in time but a living instrument to be applied to the changing needs of a society still in the process of maturation. A court must not read a bill of rights as the last will and testament, lest it becomes one. These provisions, like other constitutional provisions, are capable of growth and development over time in order to meet new social, political and historical realities often unimagined by its framers.⁵² The same philosophy should underpin the African Charter, which is a living instrument to be interpreted in the light of present day conditions and changing social attitudes.

⁵¹ R Dworkin *Life’s Dominion* (1993) 119.

⁵² Cf *Hunter v Southam* [1984] 2 SCR 145 (Canada).

Courts should similarly construe a constitutional or statutory provision corresponding to a treaty provision in accordance with the meaning that international attributes to the treaty provisions. The reason is that when the legislature chooses to implement a treaty by a statute with the same words as the treaty, it may be assumed that the legislature intended to import provisions into municipal law with same effect as the corresponding treaty provisions.⁵³ A treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose”.⁵⁴ *A fortiori*, the ‘object and purpose’ of a human rights instrument demands that its provisions should be interpreted and applied in ways that make its safeguards practical and effective.⁵⁵

All genuine interpretation is necessarily creative, that is, it is “a matter of interaction between purpose and object”,⁵⁶ and a creative interpretation is constructive, that is, it imposes “purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong”.⁵⁷ A constitutional court must also be policy-oriented, formulating and articulating the values of general validity and acceptance within a given society and infusing these values with meaning and vitality. A court must be guided at all times by a national ideology—what the Germans call the

⁵³ See N Jayawickrama *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002) 159 (arguing, “to attribute a different meaning to the statute from the meaning which international law attributes to the treaty is to nullify the intention of the legislature and to invalidate the statute in part or in whole”). Cf *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 (HL) (“Faced with an international treaty which has been incorporated into our law, British courts should now follow broadly the guidelines declared by the Vienna Convention on the Law of Treaties”, above, 712 *per* Lord Scarman).

⁵⁴ Vienna Convention on the Law of Treaties 23 May 1969 UN Doc A/conf 39/27 1155 UNTS 331 [hereinafter Vienna Convention] art 31.

⁵⁵ See *Loizidou v Turkey* (1995) 20 EHRR 99.

⁵⁶ R Dworkin *Law's Empire* (1986) 52.

⁵⁷ As above.

Volkgeist or national spirit. While decisions of a constitutional court in a democracy should serve the purpose of settling disputes between the parties before it or correcting individual mistakes in lower court judgments, its primary concern should be to elucidate, safeguard and develop the values inherent in a constitution. According to Barak, “The supreme court’s primary concern is broader, system wide corrective action. This corrective action should focus on two main issues: bridging the gap between law and society, and protecting democracy”.⁵⁸

African judiciaries must interpret constitutionally guaranteed rights in ways that trump governmental interest.⁵⁹ These rights protect not only the individual in a democracy but democracy itself. Courts must not be very positivistic or legalistic in their interpretive attitudes; they should go for the spirit of the law in the defence of human rights. Rigorous textualism may be inconsistent with originalism, since the constitution-making process is a product of compromises.⁶⁰ Judges should seek logical consistency and the symmetry of the legal structure and should not lightly sacrifice certainty, uniformity, order and coherence on the altar of judicial dexterity, but they cannot extract the meaning of constitutional provisions from legal materials alone.⁶¹ Human rights embody both legal and moral rights, and moral decisions do not admit of mathematical

⁵⁸ A Barak ‘The Supreme Court, 2001 Term-Forward, A Judge on Judging: Role of a Supreme Court in a Democracy’ (2002) 116 *Harvard Law Review* 16 27-28.

⁵⁹ Cf R Dworkin *Taking Rights Seriously* (1977) chap 7 (arguing that rights are ‘trumps’ held by individuals that outweigh collective goals). Cf *Patel v Attorney General* [1968] Zambia LR 99 116 (where the Supreme Court of Zambia held that a Bill of Rights must be broadly construed in favour of the individual rather than in favour of the state).

⁶⁰ See M Tushnet ‘The Possibilities of Comparative Constitutional Law’ (1999) 108 *Yale Law Journal* 1288.

⁶¹ Traditional constitutional courts assert that the constitutions themselves and domestic commentaries are the sole bases for the analysis and interpretation of their constitutions. See PJ Smith ‘States as Nations: Dignity in Cross-Doctrinal Perspectives’ (2003) 89 *Vanderbilt Law Review* 1 21.

certainty. A court may be “a negative legislator”,⁶² but it is a legislator nonetheless and should look for openings and create jurisprudence—through a creative interpretation of rights.

In interpreting constitutional rights, African judiciaries should also be sensitive to their countries’ past, present and, indeed, future. As Sachs correctly points out, the Bill of Rights in each country “correspond to a felt need by a large number of people, and the form that it took—its design, its meaning in society, its mode of implementation—was heavily influenced by the particular historic needs and the evolution of legal culture at the time”.⁶³ A constitutional court must also be guided by the social goals of a society in interpreting constitutional rights. As Justice Chaskalson explained in *Soobramoney v Minister of Health, KwaZulu-Natal*:⁶⁴

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at

⁶² Cited in AS Sweet *Governing with Judges: Constitutional Politics in Europe* (2000) 35. Kelsen defines a “negative legislator” as one who cannot make law freely because the decision-making is “absolutely determined by the constitution”. As above.

⁶³ A Sachs ‘Making Rights Work—the South African Experience’ in P Smith (ed) *Making Rights Work* (1999) 1 5 (elucidating, *inter alia*, the context for the elaboration of the South African Bill of Rights).

⁶⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SALR 765 (CC) [hereinafter *Soobramoney* case].

the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.⁶⁵

Refreshingly, many dicta emanating from some of Africa's superior courts appear to support the above propositions. In *Nafiu Rabiu v The State*,⁶⁶ the Nigerian Supreme Court stressed the necessity for liberalism in constitutional interpretation. Justice Udo-Udoma stated the rule thus:

My Lords, it is my view that the approach of this Court to the construction of the Constitution should be, and so it has been, one of liberalism, probably a variation on the theme of the general maxim *ut res magis valeat quam pereat*. I do not conceive it to be the duty of this Court so to construe any of the provisions of the constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.⁶⁷

In *Government of the Republic of Namibia v Cultura*,⁶⁸ Mahomed CJ similarly observed that a constitution, which is an organic law, must be interpreted broadly, liberally, and purposively, to enable it to continue to play "a creative and dynamic role in

⁶⁵ Above, para 8. Cf arguments of Mahomed DP in *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and Others* (1996) 4 SA 671 (CC); (1996) 8 BCLR 1015 (CC) para 43 (though in a different context).

⁶⁶ *Nafiu Rabiu v State* (1980) FRN 509 (SC). Cf *Okojie v The Attorney General of Lagos State* [1981] 1 NCLR 218.

⁶⁷ As above, 519.

⁶⁸ *Government of the Republic of Namibia v Cultura* [1993] 3 LRC 175 (SC).

the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people, and in disciplining its government”. And in *Dow v Attorney General of Botswana*,⁶⁹ Aguda JA stressed that courts must not allow a constitution to be “a lifeless museum piece”, but must continue to breathe life into it from time to time as opportunity arises.

I conceive it that the primary duty of the judges is to make the constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.⁷⁰

The South African Constitutional Court has contributed remarkably to the elaboration of general principles on constitutional interpretation. Its jurisprudence is a tremendous advance in the field of international human rights law, and remarkably so as the country had no history of judicial activism in such matters.⁷¹ The Court’s unanimous judgment in the *Makwanyane* case⁷² provides a point of departure. The case dealt with a number of issues,⁷³ but more importantly, it enabled the Court to lay down the general philosophy in interpreting bill of rights. According to the Court, “whilst paying due

⁶⁹ *Dow v Attorney General of Botswana* [1992] LRC (Const) 623.

⁷⁰ Above, 668.

⁷¹ M S Kende ‘The South African Constitutional Court’s Construction of Socio-economic Rights: A Response to Critics (2004) 19 *Connecticut Journal of International Law* 617 622.

⁷² *S v Makwanyane* 1995 (3) SA 391 (CC).

⁷³ For a general review of *Makwanyane* case, see H Klug ‘Striking Down Death’ (1996) 12 *South African Journal of Human Rights* 61.

regard to the language that has been used, [an interpretation of the Bill of Rights should be] ‘generous’ and ‘purposive’ and ‘give ... expression to the underlying values of the Constitution’.”⁷⁴

The Constitutional Court put this principle to a decisive, albeit controversial, use in *S v Mhlungu*.⁷⁵ There, the Court’s majority allowed persons involved in cases pending at the commencement of the Constitution to rely on rights in the interim Bill of Rights, despite the apparent provision in the Constitution to the contrary.⁷⁶ According to the Court:

An interpretation which withholds the rights guaranteed by Chapter 3 of the [interim] Constitution from those involved in proceedings which fortuitously commenced before the operation of the Constitution would not give to that chapter a construction which is ‘most beneficial to the widest amplitude’ and should therefore be avoided if the language and context of the relevant sections reasonably permits such a course.⁷⁷

The celebrated *Grootboom* case⁷⁸ provides a good example of a court’s appreciation of the social and historical settings that should inform the interpretation and application

⁷⁴ *Makwanyane* case (note 72 above) para 9; see also CS Steiker ‘Pretoria not Peoria FCIS v Makwanyane and Another, 1995 (3) SA 391’ (1996) 74 *Texas Law Review* 1285 (praising the Makwanyane decision for both its faith in the transformative possibilities of law and the value of constitutional democracy).

⁷⁵ *S v Mhlungu* 1995 (3) SA 391 (CC).

⁷⁶ See Constitution of South Africa 1996 sec 241(8) (“All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed”).

⁷⁷ *S v Mhlungu* (note 75 above) para 9.

⁷⁸ See *Government of the Republic of South Africa v Grootboom & Ors* [2000] 11 BCLR 1169 (CC) [*Grootboom* case].

of constitutional rights. The case involved the plight of desperately poor people in South Africa, who originally lived in terrible housing conditions in one of South Africa's shantytowns.⁷⁹ The group subsequently moved to privately-owned but unoccupied land that was included in an existing plan for the construction of low-cost housing.⁸⁰ The landlord obtained an order evicting them from the land, which led to demolition of the shacks they had built.⁸¹ The evictees then occupied a public football stadium, though this lacked even the minimum, albeit inadequate, facilities that their shacks provided.⁸²

The evictees sued, claiming that the government's housing policies, taken as a whole, failed to provide them with their constitutionally guaranteed right to access to adequate housing.⁸³ In giving effect to the rights of access to adequate housing and the child's right to basic nutrition, shelter, and basic health care services, the Constitutional Court insisted that the state must meet its positive obligation to devise funds, implement and supervise measures to provide relief to those in desperate need.⁸⁴ It stressed that the exclusion of the "people in desperate need" from plans to provide housing to the poor were unreasonable because a "programme that excludes a significant segment of society cannot be said to be reasonable".⁸⁵

The significance of the *Grootboom* decision lies in the Constitutional Court's refusal to abdicate its responsibility to protect disadvantaged groups from unreasonable

⁷⁹ See above, paras 2-3.

⁸⁰ See above, para 8.

⁸¹ See above, paras 9-10.

⁸² See above, para 11.

⁸³ See above, paras 11 & 13.

⁸⁴ See above, para 99.

executive decisions. The decision signals a new commitment to enforce socio-economic rights and reflects a model requiring the state and its agencies to act reasonably to discharge their constitutional obligations. The judgment meant that existing plans had to be adjusted to ensure that it contained an element that would provide housing opportunities for the “people in desperate need”,⁸⁶ thereby altering housing policy in South Africa in a very tangible way. It shows that courts can get governments to reorder their economic priorities in order to serve those most in need.

In *Grootboom*, the Constitutional Court “went further than any other court in the world has gone in giving effect to socio-economic rights”,⁸⁷ but it was prepared to defer to the government if there was a programme that had some “end in sight”.⁸⁸ In other cases, the Court simply enforces guaranteed rights without giving deference to legislative judgment.⁸⁹ *Minister of Health v Treatment Action Campaign*,⁹⁰ for example, alleged that the government violated the Constitution’s right to health care by not widely providing Nevirapine, which the World Health Organisation (WHO) said can prevent the spread of HIV/AIDS from pregnant women to their foetuses and babies.⁹¹ The government responded that its pilot programme was reasonable⁹² and that separation of powers

⁸⁵ Above, paras 43 & 64.

⁸⁶ Above, para 64.

⁸⁷ T Roux ‘Understanding Grootboom - A Response to Cass R. Sunstein’ (2002) 12 *Constitutional Quarterly* 41 44.

⁸⁸ Above, para 65 (noting that, under the existing programme, “people in desperate need are left without any form of assistance with an end in sight”).

⁸⁹ See M Tushnet ‘Social Welfare Rights and the Forms of Judicial Review’ (2004) 82 *Texas Law Review* 1895 1906.

⁹⁰ See *Minister of Health v Treatment Action Campaign* [2002] 5 SALR 721 (CC) [hereinafter TAC].

⁹¹ See above, para 1.

⁹² The South African Government had embarked upon a pilot program for the distribution of Nevirapine at two public health centres in each province. The Government argued that a broader programme was not feasible as Nevirapine only

required courts to stay out of such issues. In a unanimous decision, the Constitutional Court ordered the government to provide the free Navirapine. The Court reiterated that “[t]he State is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society”.⁹³ Applying this principle, the Court held the government’s inaction as unreasonable, since it “fail[ed] to address the needs of mothers and their newborn children who do not have access to these [pilot] sites”.⁹⁴

Continental courts also have broadened their interpretive toolkits to aid the realisation of socio-economic rights. For example, the Canadian Supreme Court held, in *Gosselin v Attorney General of Quebec & Ors*,⁹⁵ that nothing in the jurisprudence suggests that section 7 of the Quebec Charter of Human Rights and Freedoms places a positive obligation on the state to ensure that each person enjoys life, liberty or security. However, the Court did not rule out the possibility of such an interpretation, arguing that the Charter must be capable of growth and not be frozen in time.⁹⁶ In his dissenting opinion, Justice Arbour insisted that limiting section 7 to only negative rights is unduly restrictive. Relying on recent a jurisprudence, he also argued that “principles of fundamental justice” in sections 8 to 14 of the Quebec Charter entrench positive rights⁹⁷ and that interpreting

worked when infected mothers used formula to feed their newborns and that it lacked the capacity to insure that women all over the country used formula to feed their babies. See above, paras 14-15.

⁹³ Above, paras 35-6.

⁹⁴ Above, paras 67.

⁹⁵ *Gosselin v Attorney General of Quebec & Ors* [2002] SCC 84.

⁹⁶ Cf *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927; *Hunter v Southam Inc* [1984] 2 SCR 145.

⁹⁷ See eg *Schachter v Canada* [1992] 2 SCR 679; *New Brunswick (Minister of Health and Community Services) v G(J)* [1999] 3 SCR 46; and *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307.

the right to life otherwise would render it meaningless and undermine the coherence and purpose of the Charter as a whole.

4.3.2 *Interpreting Indirectly Enforceable Rights*

Where there are no direct human rights guarantees in a constitution or where these rights, though incorporated, are placed beyond judicial scrutiny, then the question turns on the interpretive methodology for the enforcement of these rights. Tushnet has correctly argued that non-justiciable rights need not be legally irrelevant.⁹⁸ Such rights could be used to support interpretations that ordinarily would not be natural ones according to accepted standards of statutory interpretation. They could also be invoked to explain a court's refusal to recognise other rights, where their recognition would impair the government's ability to implement the non-justiciable rights.⁹⁹

The Indian Supreme Court¹⁰⁰ has been exemplary in utilising non-justiciable provisions of the Indian Constitution of 1950 (as amended) to facilitate the implementation of socio-economic rights. India fashioned its post-independence Constitution¹⁰¹ in the era of the UDHR. Many of the fundamental rights provisions go beyond classic rights to impose constitutional duties on private actors and the state;¹⁰²

⁹⁸ See Tushnet 'Social Welfare Rights' (note 89 above), 1898.

⁹⁹ See above.

¹⁰⁰ Articles 131 – 133 define the jurisdiction of the Indian Supreme Court. *Inter alia*, it exercises original jurisdiction in cases involving the government and appellate jurisdiction in a variety of cases; rules on cases involving constitutional interpretation; it exercises jurisdiction over civil cases that involve a substantial question of law with general importance. It is also an appellate court for some criminal cases, with power to grant special leave to appeal, with writ jurisdictions over questions of fundamental rights, and with the authority to issue advisory opinions.

¹⁰¹ India gained independence from the UK in 1947.

¹⁰² See eg Indian Constitution sec 15 (prohibition of discrimination), 17 (abolition of "untouchability"), and 21 (protection of life and liberty).

others endorse “positive discrimination” for historically oppressed groups.¹⁰³ Nonetheless, the Constitution bifurcates rights into the classic civil and political rights, which are termed fundamental rights, and other non-justiciable normative values—directive principles—to guide state policy.¹⁰⁴ The Constitution renders these directive principles non-justiciable.¹⁰⁵

For years, the Indian Supreme Court has managed to apply more substantive conceptions of equality to uphold rights to health, education, shelter, and others.¹⁰⁶ In a number of Social Action Litigation (SAL)—beginning with *People’s Union for Democratic Rights v Union of India*,¹⁰⁷ the Supreme Court deployed the directive principles to support the constitutionality of social legislation. In *Manguru v Commissioners of Budge, Budge Municipality*,¹⁰⁸ the Court held that legislation is needed to implement the directive principles and that so long as there is no law carrying out the policy laid down in a directive, neither the State nor an individual can violate any existing law or legal right under the colour of following a directive. In the *Union of India* case, the Court found that the practice of employment of workers at sub-minimum wages violated

¹⁰³ As above sec 15(4).

¹⁰⁴ International and domestic sources informed the directive principles. The international sources included the 1789 French Declaration of the Rights of Man and the Citizen, the American Declaration of Independence, the Constitution of the Irish Republic, and the Constitution of Republican Spain. The local sources included the 1931 resolution of the pro-independence Indian National Congress, which defined political freedom in the Indian context to include “real economic freedom of the starving millions”. VD Mahajan *Introduction to Constitutional Law of India* (1991) 365. Others insist that the distinction between the justiciable and non-justiciable provisions in the Indian Constitution arose not in the context of negative and positive rights but in the context of minority rights. See Austin *The Indian Constitution: Cornerstone of a Nation* (1966) 57.

¹⁰⁵ Indian Constitution sec 37.

¹⁰⁶ See PB Mehta ‘The Rise of Judicial Sovereignty’ (2007) 18(2) *Journal of Democracy* 70 71 (adding: “To one degree or another, the executive branch has responded by at least trying to make provisions for the guarantee of these rights”).

¹⁰⁷ *People’s Union for Democratic Rights v Union of India* (1982) AIR 1473 SC (challenging private-sector employment policies in connection with the Asian Games that India hosted).

¹⁰⁸ *Manguru v Commissioners of Budge, Budge Municipality* (1951) 87 CLJ 369.

section 23's prohibition of human trafficking and forced labour.¹⁰⁹ It invoked the directive principles in the Indian Constitution to hold that the government had failed in its constitutional duty to protect workers and ensure that previously enacted statutes establishing a minimum wage were enforced.¹¹⁰ The Court reasoned that the inherent vulnerability and desperation associated with the dire poverty in India rendered a decision to take a job below the minimum wage an involuntary one.¹¹¹

In some cases, like *Paschim Banga Khet Mazdoor Sabha v State of West Bengal*,¹¹² the Court duly acknowledged the existence of financial constraints on the part of the government. Nevertheless, the Court insisted that the provision of medical facilities for citizens is a state's obligation, which is not discharged by merely pleading such constraints. In other cases, the Supreme Court relied on the directive principles to found violations of the right to life where a government failed to provide facilities for education or shelter. In *Laxmi Kant v Union of India*,¹¹³ the Court held that the right of children to life and livelihood included the right to be protected against emotional and material neglect. In *Olga Tellis v Bombay Municipal Corporation*,¹¹⁴ the Court interpreted the right to life to encompass the right to a safe working environment and the right to earn a living. On other occasions, the Court assumes "epistolary jurisdiction" and perform a more political task by setting up groups of experts to investigate living and working

¹⁰⁹ *People's Union for Democratic Rights v Union of India* (note 197 above) 1475.

¹¹⁰ As above.

¹¹¹ As above.

¹¹² *Paschim Banga Khet Mazdoor Sabha v State of West Bengal* (1996) 4 SCC 37.

¹¹³ *Laxmi Kant v Union of India* (1987) 1 SCC 67.

¹¹⁴ *Olga Tellis v Bombay Municipal Corporation* (1986) AIR 180 SC.

conditions of workers. It justifies such a political role on the basis of the executive's abdication of its constitutional mandate.

*Bundhua Mukti Morcha v Union of India*¹¹⁵ provides a striking case study. The suit was initiated on behalf of workers in the stone quarries near the city of Delhi, through a letter challenging that the stone-crushers were bonded labourers forced to work under extreme and intolerable conditions. The letter cited a lack of housing, clothing, health care, clean water, and exposure to heavy air pollutions generated by stone crushing machines. Due to these intolerable conditions, according to the complaint, many of the workers took ill and some died from tuberculosis and related diseases. There were neither medical care to the victims nor compensation to their families. Relying on the report of its investigators, the Court held that the state had violated the right to life in section 21 of the Indian Constitution, including the right "to live in human dignity, free of exploitation".¹¹⁶ It held that the directive principles provided authority to order the State to enforce legislations enacted to protect workers and further ordered the State to educate workers about their social and labour rights to prevent vulnerability to exploitation.¹¹⁷ The Court justified its use of epistolary jurisdiction and third-party standing as necessary to protect the rights of vulnerable groups in India.¹¹⁸

African judicial institutions should similarly treat the "directive principles" not as mere affirmations and declarations of common beliefs.¹¹⁹ Courts should assume that the

¹¹⁵ *Bundhua Mukti Morcha v Union of India* (1984) AIR 802 SC.

¹¹⁶ As above, 806.

¹¹⁷ As above.

¹¹⁸ As above.

¹¹⁹ See BO Nwabueze *Ideas and Facts in Constitution Making* (1993) 260.

social contract in Africa establishes a different kind of relationship between the individual and society than that represented by the limited-government paradigm. The Nigerian Constitution will serve as an illustration. The Constitution urges the state, within its ideals and objectives, to harness the nation's resources to promote national prosperity¹²⁰ and control the economy to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice, equality of status and opportunity.¹²¹ It exhorts the state to direct its policy towards ensuring that the nation's material resources are harnessed and distributed as best as possible to serve the common good;¹²² that the economic system is not operated in such a manner that permits the concentration of wealth or the means of production and exchange in few individuals or groups;¹²³ and that suitable and adequate shelter and food, reasonable national minimum living wage, old age care and pensions, unemployment and sick benefits and welfare for the disabled are provided for all citizens.¹²⁴

Nigeria's social order, according to the Constitution, "is founded on ideals of freedom, equality and justice".¹²⁵ In furtherance of this order, the Constitution guarantees to "every citizen" the "equal rights, obligations and opportunities before the law". It prohibits the "exploitation of human and natural resources in any form whatsoever for

¹²⁰ See Nigerian Constitution sec 16(1)(a).

¹²¹ As above, sec 16(1)(b).

¹²² As above, sec 16(2)(b).

¹²³ As above, sec 16(2)(c).

¹²⁴ As above, sec 16(2)(d).

¹²⁵ As above, sec 17(1).

reasons other than the good of the community”.¹²⁶ It urges the State to direct its social policy towards ensuring that—

all citizens, without discrimination on any ground whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment; ...there are adequate medical and health facilities for all persons; ... children, young persons, and the aged are protected against any exploitation whatsoever, and against moral and material neglect; [and] provision is made for public assistance in deserving cases or other conditions of need.¹²⁷

As for education objectives, the Nigerian Constitution urges the government to direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.¹²⁸ It must strive to eradicate illiteracy by providing, “when practicable,” free, compulsory and universal primary education, free secondary education, free university education, and free adult literacy programme.¹²⁹

The Namibian Constitution similarly consigns what are usually categorised as socio-economic rights to its Chapter 11 provisions entitled ‘Principles of State Policy’, though there are few enforceable provisions relating to children’s rights,¹³⁰ rights to property,¹³¹

¹²⁶ As above, sec 17(2)(a)&(d).

¹²⁷ As above, sec 17(3)(a)(d)(f)&(g).

¹²⁸ As above, sec 18(1).

¹²⁹ As above, sec 18(3).

¹³⁰ See Namibia Constitution, sec 15.

¹³¹ As above, sec 16.

education,¹³² and to freedom of association, including “freedom to form and join associations or unions, including trade unions”.¹³³ The directive principles require the state to actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at ensuring that the health and strength of the workers are not abused; ensuring that economic necessity does not force citizens to enter vocations unsuited to their age and strength; actively encouraging the formation of trade unions to protect workers’ rights and interests; promoting sound labour relations and fair employment practices; ensuring that every citizen has a right to fair and reasonable access to public facilities and services; and ensuring that senior citizens receive pension adequate for the maintenance of a decent standard of living.¹³⁴ Others include providing just and affordable social benefits for the unemployed, incapacitated and disadvantaged; ensuring that workers are paid a living wage adequate for the maintenance of a decent standard of living; raising and maintaining an acceptable level of nutrition and improving public health; and maintaining the ecosystems, essential ecological processes and biological diversity, and utilizing living natural resources on a sustainable basis. The Constitution concludes that its directive principles “shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles”.¹³⁵ It,

¹³² As above, sec 20. Cf JC Mubangizi ‘The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation’ (2006) 2(1) *African Journal of Legal Studies* 1 10 (stressing, “the only constitutional socio-economic rights in the Namibian Constitution that can be categorised as such are the right to education, and to some extent, children’s rights and property rights”).

¹³³ Namibia Constitution, sec 21(1)(e). See also above, sec 21(1)(f) (providing for the right to withhold labour without being exposed to criminal penalties).

¹³⁴ Above, sec 95.

¹³⁵ Above, sec 101.

however, permits courts “to have regard to the said principles in interpreting any laws based on them”.¹³⁶

Clearly, some provisions under “directive principles” are scarcely suited to judicial determination. An example is the Nigerian Constitution’s provision that “the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group”.¹³⁷ Nevertheless, other provisions are capable of judicial determination or could, at least, be justiciable by legislation, as the Nigerian Supreme Court held in *Attorney General Ondo State v Attorney General Federation*.¹³⁸ The case challenged the Corrupt Practices and Other Related Offences Act 2000,¹³⁹ which the National Assembly enacted pursuant to section 15(5) of the 1999 Constitution.¹⁴⁰ The Appellant argued, *inter alia*, that since Chapter II of the Constitution is not justiciable, it could not be subject of any enactment or law and, by implication, of enforcement.¹⁴¹ The appellant further contended that section 15(5) and all other provisions of Chapter II stand-alone and cannot be read with other provisions of the Constitution.

¹³⁶ Above.

¹³⁷ See Nigeria Constitution, sec 16(2)(c).

¹³⁸ *Attorney General Ondo State v Attorney-General Federation* [2002] FWLR (Pt 111) 1972 [hereinafter *Attorney General Ondo State* case].

¹³⁹ See Corrupt Practices and Other Related Offences Act 2000 Cap 359 Laws of the Federation of Nigeria 2000 [hereinafter Corrupt Practices Act] (prohibiting and prescribing punishment for corrupt practices and other related offences).

¹⁴⁰ Providing: “The State shall abolish all corrupt practices and abuse of power”. See also Nigerian Constitution 2nd Sch Pt 1 item 60(a) (conferring on the National Assembly the exclusive competence to legislate in “[t]he establishment and regulation of authorities for the Federation or any part thereof ... to promote and enforce the observance of Fundamental Objectives and Directive Principles contained in this Constitution”).

¹⁴¹ See *Attorney General Ondo State* case (note 138 above) 2208.

The Supreme Court rejected this argument. Citing with approval the Indian case of *Paschim Banga Khet Mazdoor Sabha v Bengal*,¹⁴² the Court held that to accept such a restricted submission “is to fly in the face of settled principle of Constitutional interpretation that the duty of the Court is to read and construe together all the provisions of the Constitution, unless there is very clear reason that a particular provision of the Constitution should not be read together”.¹⁴³ Reading the Constitution holistically, the Court concluded that the legislature has power to make laws to promote and defend the fundamental objectives and directive principles in the Constitution.¹⁴⁴ This path-breaking decision, *albeit* not directly related to human rights, could lay the foundation for the development of socio-economic rights in Nigeria.

Significantly, Ghanaian courts have also held that the enforceability of socio-economic rights is not limited to those in the Bill of Rights, but that it extends to those in the Directive Principles of State Policy. In *New Patriotic Party v Attorney General*,¹⁴⁵ the Court held, *inter alia*, that although the Directive Principles of State Policy are not in themselves legally enforceable by the courts, there are exceptions to this principle in that where Directive Principles are read together with other enforceable parts of the Constitution, they then become enforceable.¹⁴⁶

The logical conclusion from the above analysis is that affirmations in “Directive Principles” suggest a more active role for governments in securing the basic needs of

¹⁴² As above 2070.

¹⁴³ As above 2208.

¹⁴⁴ As above.

¹⁴⁵ *New Patriotic Party v Attorney General* (1996–97) SCGLR 729.

¹⁴⁶ Above, 788.

their citizens. Nwabueze sees such affirmations as parts of “the process of creating a national acceptance of, and attachment to, those beliefs and objectives, with a view to eventual growth of habits and tradition of respect for them”.¹⁴⁷

4.3.3 *Interpreting Ratified but Unincorporated Instruments*

On many occasions, states simply ratify human rights treaties, including those guaranteeing socio-economic rights, without domesticating them in their municipal legal systems. What is the status of such unincorporated treaties? This question has been, and still is, a subject of debates. In principle, the applicability of a human rights treaty at the municipal level is a function of the relationship between international and municipal law. On this question, two main theories struggle for dominance—monism and dualism. The dualists insist that “international law and internal law are two separate legal orders, existing independently of one another”.¹⁴⁸ For the monists, international law and internal law are part of the same order.¹⁴⁹ For states favouring a dualist approach, the substantive norms of the (human rights) treaty must be “transformed” or “adopted” to become applicable in domestic law.¹⁵⁰ Such systems are not prone to absorb international law into

¹⁴⁷ Nwabueze *Ideas and Facts in Constitution Making* (note 119 above) 260.

¹⁴⁸ G Fitzmaurice ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law’ (1957) II *Recueil des Cours* 5 70.

¹⁴⁹ As above. For a more recent analysis of this problem, particularly in the human rights field, see C Harland ‘The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of state Parties: An Initial Global Survey through UN Human Rights Committee Documents’ (2000) 22(1) *Human Rights Quarterly* 187.

¹⁵⁰ See A Cassese ‘Modern Constitutions and International Law’ (1985) III *Recueil des Cours* 331.

the domestic legal system, “even if the underlying social values are similarly sympathetic to the rights in question”.¹⁵¹

Generally, most civil law countries, such as Senegal, Cameroon, Benin, Niger, and Namibia, adopt monism, while most common law countries, such as Nigeria, Ghana, and Sierra Leone, adopt dualism. Two constitutional provisions will serve to illustrate this division. I turn again to the Nigerian Constitution, which is based on dualism. It provides: “No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly”.¹⁵² Contrariwise, the Namibian Constitution is monist. It too provides: “Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia”.¹⁵³

The African Charter, for example, became part of Namibia’s law through incorporation, but it became part of Nigerian law through a separate local enactment: the African Charter (Ratification and Enforcement) Act.¹⁵⁴ Strangely, the Charter is silent on what should be done to those countries that have ratified it but never showed commitment to put in place appropriate domestic mechanisms. The African Commission also has not specifically enjoin the incorporation of the Charter way, perhaps mindful that there is no uniformity in the reception of international law in Africa. In 1989, however, the Commission recommended that Member States should “introduce[...] the provisions of

¹⁵¹ See BA Simmons ‘Why Commit? Explaining State Acceptance of International Human Rights Obligations’ *available at* <http://www.law.nyu.edu/clep/documents/Simmons.pdf>.

¹⁵² Nigerian Constitution sec 12(1).

¹⁵³ Namibia Constitution sec 144.

Articles 1 to 29 of the African Charter . . . in their Constitutions, laws, rules and regulations and other acts relating to Human and Peoples' Rights".¹⁵⁵ When Nigeria incorporated the Charter after its ratification, the Commission expressed its approval and hoped that such gesture should "set a standard for all Africa".¹⁵⁶

Umozurike believes that "[t]he effect of a human rights treaty will be greatly reduced if it is not incorporated into law".¹⁵⁷ Umozurike is echoing a judicial mindset that insists on the non-justiciability of unincorporated international treaties. The common law tradition, which some African countries subscribe, avoids consideration of unincorporated conventional law. In *Blackburn v Attorney General*,¹⁵⁸ the United Kingdom (UK) proposed to sign the Treaty of Rome to accede to the European Communities. The proposal was challenged and the English Court of Appeal said: "It is elementary that these courts take no notice of treaties as such . . . until they are embodied in laws enacted by Parliament, and then to the extent that Parliament tells us".¹⁵⁹

The present writer urges African courts to interpret (unincorporated) human rights instruments in ways that do not diminish states obligations. They should fuse the normative content of international human rights norms into their own interpretation of

¹⁵⁴ See African Charter (Ratification and Enforcement) Act Cap A9 Laws of the Federation of Nigeria 2004.

¹⁵⁵ *Resolution on the Integration of the Provisions of the African Charter on Human and Peoples' Rights into National Laws of States* Second Annual Activity Report of the African Commission 1988–1989 Annex XI.

¹⁵⁶ See *Civil Liberties Organization v Nigeria* Comm No 129/94 para 17 (2000) AHRLR 188 (ACHPR 1995) reprinted in Ninth Annual Activity Report of the African Commission 1995-1996 Annex VI.

¹⁵⁷ UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 107.

¹⁵⁸ *Blackburn v Attorney General* [1971] 1 WLR 1037 (English CA).

¹⁵⁹ As above, 1039 *per* Lord Denning MR. Cf *McWhirter v Attorney General* [1972] CMLR 882 886-7 (where a similar challenge brought after the Treaty of Accession was signed by before its implementation by Act of Parliament).

domestic norms, by altering the content of the latter to reflect the former.¹⁶⁰ The legal systems of our contemporary world no longer occupy separate spheres but overlap and interact. As Hunt convincingly argues:

A norm of international treaty law may not be ‘part of’ domestic law in the sense that it gives rise to a right or obligation which is directly enforceable in domestic courts and on which individuals may therefore found their case, but, insofar as judicial recourse to it is permitted by the treaty presumption, to assist in the interpretation of domestic statute law, or its customary or near-customary status provides guidance in the development of domestic common law, it is clearly of legal relevance.¹⁶¹

Another legal basis for the judicial recognition of the fundamental importance of human rights treaties is that some of these treaties merely codify customary law.¹⁶² There is reason, for example, to argue that the African Charter has acquired the status of a regional custom,¹⁶³ binding on African states and creating obligations at the domestic level without the necessity for domestication. The first reason for this assertion is the universal ratification that the Charter has enjoyed in Africa. The second reason is that the Charter has a *sui generis* character; it is, to borrow a phrase from Drzemczewski, “a

¹⁶⁰ See, in general, RB Lillich ‘The Role of Domestic Courts in Enforcing International Human Rights Law’ in H Hannum (ed) *Guide to International Human Rights Practiced* (1992) 239 (examining the use of international human right law to infuse constitutional and statutory standards in the US).

¹⁶¹ Hunt (note 19 above) 41-2.

¹⁶² For a discussion of the relationship between conventional human rights law and customary law, see T Meron *Human Rights and Humanitarian Norms as Customary Law* (1989).

¹⁶³ In the *Asylum* case 1950 ICJ Rep 266, the International Court of Justice (ICJ) recognised the possibility for the existence of a local or regional customs amongst a group of states in their relations *inter se*, in addition to a general custom

treaty of a normative character which is developing an evolving notion of ‘Convention law’ which interpenetrates and transcends both the international and domestic legal structures”.¹⁶⁴

The Nigerian Supreme Court affirmed the *sui generis* nature of the Charter in *Abacha v Fawehinmi*,¹⁶⁵ when it established that: “(a) the African Charter is a special genus of law in the Nigerian legal and political system; [and] (b) the Charter has some international flavour and in that sense it cannot be amended or watered down or sidetracked by any Nigerian law.”¹⁶⁶ Earlier, in *Chima Ubani v Director of State Security Services and Attorney General of the Federation*,¹⁶⁷ the Nigerian Court of Appeal held that the African Charter was superior to all municipal laws, including Decrees of the Military Government. It also held that Decree No. 12 of 1994 and the provision ousting the jurisdiction of civil courts were ineffectual in preventing the lower court from assuming jurisdiction in the case of an infraction of rights recognised and protected under the Charter.

binding on the international community as a whole. Local customs could also exist only between two states, as was held to exist between India and Portugal in the *Right of Passage* case 1960 ICJ Rep 6.

¹⁶⁴ A Drzemczewski *European Human Rights Convention in Domestic Law: A Comparative Study* (1983) 33 (arguing that the European Convention on Human Rights, though an international treaty, has given rise to a new type of law that defies classification as either international or domestic law).

¹⁶⁵ *Abacha v Fawehinmi* [2000] 6 NWLR (Pt. 660) 228 (SC Nig).

¹⁶⁶ Above, 347. Cf *Gani Fawehinmi v Sani Abacha & Ors* (1996) 9 NWLR (Pt 475) 710 (CA Nig) (holding that the African Charter has “an aura of inviolability unlike most municipal laws and may as long as it is in the statute book be clothed with vestment of inviolability”); and *Oshevire v British Caledonian Airways Ltd* (1991) 2 NWLR (Pt 189) 234 (Nig).

¹⁶⁷ *Chima Ubani v Director of State Security Services and Attorney General of the Federation* CA Lagos unreported CAL/260/96 7 July 1999 (on file with author).

Like municipal jurisprudence, international tribunals also stress the *sui generis* nature of certain types of treaties. In the *Reservations to the Genocide Convention* case,¹⁶⁸ the ICJ said of the 1948 Genocide Convention:

In such a convention the Contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States or of the maintenance of a perfect contractual balance between rights and duties.¹⁶⁹

In the *Barcelona Traction, Light and Power Co* case,¹⁷⁰ the ICJ recognized that basic rights of human persons create obligations *erga omnes*, violations of which allows any state to pursue international remedies against any other state. States may also have legal interests in matters of general humanitarian nature, for example, on atrocities affecting human beings in another country. All of this shows that courts, including domestic courts, should not approach human rights treaties with the same conceptual apparatus as those normally used in traditional international law.

¹⁶⁸ Advisory Opinion on *Reservations to the Genocide Convention* 1951 ICJ Rep 15.

¹⁶⁹ Above, 23. See Convention on the Prevention and Punishment of the Crime of Genocide 9 Dec 1948 78 UNTS 277 [hereinafter Genocide Convention].

¹⁷⁰ *Barcelona Traction, Light and Power Co case (Belgium v Spain)* 1970 ICJ Rep 3.

The monism/dualism debate does not need to be resolved for the effective implementation of the African Charter or, for that matter, the ICESCR.¹⁷¹ The substantive provisions of the Charter, as interpreted by the African Commission, are integral parts of domestic law. Domestic courts should interpret the Charter with a general presumption that governments do not intend to legislate inconsistently with their obligations under international law.¹⁷² Otherwise stated, African judicial institutions should enforce the African Charter and similar instruments ratified by African states whether or not these instruments have been domesticated. The days of dualistic purity should be over in matters of human rights, in the interest of humanity. The focus should be the principle of *pacta sunt servanda*, the sacred principle that agreements are binding and are to be implemented in good faith.¹⁷³

4.3.4 *Extra-territorial Interpretation of Rights*¹⁷⁴

Whether for directly or indirectly enforceable or, for that matter, incorporated and unincorporated instruments, African judiciaries have greater possibilities to advance socio-economic rights if they engage in extraterritorial interpretation of rights. The constitutions of some African states, such as Angola, Cape Verde, Malawi and South Africa, expressly enjoin courts to invoke international and comparative law. Section

¹⁷¹ Cf Drzemczewski (note 164 above) 41 (calling for a transcendence of the monist/dualist dichotomy in relation to international human rights law stressing, “the domestic status of international legal norms is in reality a matter of degree”); FG Jacobs ‘Introduction’ in FG Jacobs and S Roberts (eds) *The Effect of Treaties in Domestic Law* xxiv (1987) (regarding the monist/dualist antithesis as an oversimplification that must be viewed with caution).

¹⁷² Cf *Smith v East Elloe Rural District Council* [1956] AC 736 765 HL (per Lord Reid).

¹⁷³ See Vienna Convention (note 54 above) art 26.

¹⁷⁴ See, in general, NJ Udombana ‘Interpreting Rights Globally: Courts and Constitutional Rights in Emergent Democracies’ (2005) 5 *African Human Rights Law Journal* 47; A Slaughter ‘Judicial Globalization’ (2000) 40 *Vanderbilt*

21(2) of the Constitution of Angola and section 17(3) of the Constitution of Cape Verde provide that constitutional and legal norms related to fundamental rights shall be interpreted and incorporated in the light of international instruments. Section 11(2) of the Constitution of Malawi enjoins the judiciary to “have regard to current norms of public international law and comparative law”. Section 39 of the South Africa Constitution, on its part, provides: “When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; and (b) must consider international law; and (c) may consider foreign law”.¹⁷⁵

Comparative constitutionalism raises theoretical and normative problems. Can such a practice be justified in the absence of an express constitutional authorization? Should transitional judiciaries invoke international and comparative law to interpret constitutions that are products of different cultural and historical developments? What are the parameters of such an exercise; or are judges free to engage in a voyage of discovery without any compass? Comparative constitutionalism is met with the sovereigntist objection that ratified but unincorporated human rights treaties are not binding on domestic courts, let alone unratified treaties or even the jurisprudence of other jurisdictions. Such a practice is said to open the floodgate for application of laws born to different countries in different ages in different circumstances. Others argue that judicial

Journal of International Law 1103 (arguing for a transnational communication between courts); and B Ackerman ‘The Rise of World Constitutionalism’ (1997) 83 *Vanderbilt Law Review* 771.

¹⁷⁵ Cf Interim Constitution of South Africa 1993 sec 35(1) (“In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law”). There are basic differences between sec 39 of the 1996 Constitution and sec 35(1) of the 1993. Sec 39, for example, expands the interpretation imperative to non-judicial fora and modifies the judicial imperatives with regard to public international law. See H Webb ‘The Constitutional Court of South Africa: Rights

review derives from a court's duty to enforce a nation's constitution, not to interpret "a wholly different document".¹⁷⁶

Comparative constitutionalism, its opponents insist, upsets the acculturation of a society through the legislative process. Since laws are imbedded in the culture of a people, it is wrong to disaggregate legislation from its cultural instantiation.¹⁷⁷ Childress argues that "[e]ach legal system is autonomous and is perhaps incapable of legal transplant. Any transplant would be a rejection of the organic law that is part of that society and culture".¹⁷⁸ Opponents of comparative constitutionalism appeal to Montesquieu's argument that laws "should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another".¹⁷⁹ They argue that comparative constitutionalism raise questions of democratic legitimacy. Modern liberal democracies tend to justify judicial authority in terms of the rule of law; and the rule of law produces an argument for "legislative sovereignty in its narrowest and least reflective sense".¹⁸⁰ They also fear the danger that judicial comity may one day require that a country's Constitutional or Supreme Court reach a decision that is not in that country's best interest.¹⁸¹

Interpretation and Comparative Constitutional Law' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 205 208 n 13.

¹⁷⁶ JC Yoo 'Peeking Abroad? The Supreme Court's Use of Foreign Precedents in Constitutional Cases' (2004) 4 *International Legal Studies Working Paper Series* available at <http://repositories.edlib.org/ils.wp/4>.

¹⁷⁷ See D Childress III 'Using Comparative Constitutional Law to Resolve Domestic Federal Questions' (2003) 53 *Duke Law Journal* 193 217 219.

¹⁷⁸ As above, 220.

¹⁷⁹ C de Secondat 'Baron de Montesquieu' DW Carrithers (ed) *The Spirit of the Laws* (1977) (1748) bk 1 ch 3 104-05.

¹⁸⁰ C Harlow 'Voices of Difference in a Plural Community' (2002) 50 *American Journal of Comparative Law* 339 341.

¹⁸¹ See C Moon 'Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?' (2003) 12 *Journal of Law and Policy* 229 245.

Many jurisdictions are reluctant to apply comparative constitutional analysis.¹⁸² As early as 1980, some lower courts in the US had approached the Alien Tort Statute from the prism of customary international law,¹⁸³ but as late as 1997, Justice Scalia of the US Supreme Court still wrote that “comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one”.¹⁸⁴ Ackerman agreed, arguing that the “spirit of the American Constitution requires limiting the scope of inquiry to American sources”.¹⁸⁵ He continued:

To discover the Constitution, we must approach it without the assistance of guides imported from another time and place. Neither Aristotle nor Cicero, Montesquieu nor Locke, Harrington nor Hume, Kant nor Weber will provide the key. Americans have borrowed much from such thinkers, but they have also built a genuinely distinctive pattern ... As we lose sight of these ideals, the organizing patterns of our political life unravel.¹⁸⁶

Objections to comparative constitutionalism do not represent the whole truth. Comparative constitutionalism is “emphatically ... relevant to the task of interpreting

¹⁸² See Barak (note 58 above) 114 (stressing the reluctance of the US Supreme Court in invoking comparative law); Moon (note 181 above) 240.

¹⁸³ See eg *Filartiga v Pena-Irala* 630 F2d 876 (2d Cir 1980). See also CA Bradley ‘The Alien Tort Statute and Article III’ (2002) 42 *Vanderbilt Journal of International Law* 587.

¹⁸⁴ *Printz v United States* (1997) 521 US 898 921 n 11. Cf A Scalia ‘Commentary’ (1996) 40 *St Louis University Law Journal* 1119 (arguing that “international norms” should not control adjudication of domestic issues in the US courts).

¹⁸⁵ B Ackerman *We the People: Foundations* (1991) 3.

¹⁸⁶ As above, 3-4 6.

constitutions and enforcing human rights”¹⁸⁷ and can be “helpful in the quest for a theory of the public good and right political order”.¹⁸⁸ Even unincorporated human rights treaties, though not part of domestic law for states practicing dualism, could help to resolve uncertainty and ambiguity in domestic law.¹⁸⁹ Resort to international jurisprudence could also provide guidance, perspective, inspiration or reassurance for judges and may help in elucidating different functional concerns to similar questions and in strengthening the quality of judicial decisions, by providing a benchmark against which such decisions could be judged.¹⁹⁰

In relation to human rights, comparative constitutionalism is legitimate and imperative for many reasons. First, the language of human rights has become global, spoken by political leaders and ordinary citizens, an apparent rediscovery that humanity is confronted with common problems. Dr. Johnson wrote many years back that people everywhere are prompted by the same motives, deceived by the same fallacies, all animated by hope, obstructed by danger, entangled by desire, and seduced by pleasure.¹⁹¹ It is naïve for African judges to expect the breeze of globalisation to pass them idly by. No institution of government can now afford to ignore the rest of the world.

A second but related justification is that, despite differences in historical development or the conceptual structure and style of operation that exist in different legal systems,

¹⁸⁷ RB Ginsburg & DH Merritt ‘Fifty-first Cardozo Memorial Lecture: Affirmative Action: An International Human Rights Dialogue’ (1999) 21 *Cardozo Law Review* 253 282.

¹⁸⁸ DP Kommers ‘The Value of Comparative Constitutional Law’ (1976) 9 *John Marshall Journal of Practice and Procedure* 685 692.

¹⁸⁹ See *R v Secretary of State for the Home Department ex parte p Brind* [1991] 1 AC 696.

¹⁹⁰ See VC Jackson ‘Narratives of Federalism’ (2001) 51 *Duke Law Journal* 223 254-63.

¹⁹¹ See BH Bronson (ed) *Samuel Johnson: Rasselas, Poems, and Selected Prose* (1971) 95.

these systems give the same or similar solutions to the problems of life. The reality is that, by reason of colonialism and imperialism, the legal systems of most African states are a mosaic, a hotchpotch of common or civil law as well as customary and Islamic laws. It is incorrect to assert that each legal system is autonomous. The bills of rights in Africa are generally composed in a very similar manner to those of the Western world and bear, in particular, the imprimatur of the Universal Declaration of Human Rights.¹⁹² These constitutions rest, to borrow Weinrib's words, "on a shared constitutional conception that, by design, transcends the history, cultural heritage, and social mores of any particular nation-state".¹⁹³ Nearly all African countries assume a model that basically derives from those of liberal democracies, at least from a formal point of view.¹⁹⁴

The values that underpin modern constitutions—justice, democracy, freedom, equality, and the dignity of the human person—share a multinational history and universal acceptance. These values are standards for sound constitutional engineering, making it imperative for constitutional courts and lawyers to be comparatists. Dignity, for example, is the common denominator of our very humanity and is "above all price and so admits of no equivalent". The UDHR also provides that "[a]ll human beings are born free and equal in dignity and rights"¹⁹⁵ and almost all other international human rights instruments contain similar provisions. A state cannot use its particular national or

¹⁹² Universal Declaration of Human Rights adopted 10 Dec 1948 GA Res 217 A (III) GAOR 3d Sess [hereinafter UDHR].

¹⁹³ Weinrib 'Constitutional Conceptions and Constitutional Comparativism' in Jackson & Tushnet (eds) *Defining the Field of Comparative Constitutional Law* (2002) 3 15.

¹⁹⁴ See V Piergigli 'The Reception of Liberal Constitutionalism and "Universal" Values in the African Bills of Rights: Ambiguities and Perspectives in the Turn of the Millennium' *trans at* <http://www.eur.nl/frg/iacl/papers/piergigli.html> (noting exceptions in constitutional provisions concerning torture or slavery and forced labour, that is, practices that are either autochthonous or related to the colonial period).

¹⁹⁵ UDHR (note 192 above) art 1.

religious tradition to justify its failure to respect human dignity; neither could such failure be justified “in the name of majoritarian political processes”.¹⁹⁶

Dignity is a central value that animates the South African Constitutional Court’s interpretation of the Bill of Rights. Section 39(a) of the South Africa Constitution provides that interpretation of the Bill of Rights “must promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.¹⁹⁷ Justice O’Regan stressed as much, in *Makwanyane*’s case, when she held:

Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution.¹⁹⁸

The jurisprudence of the South African Constitutional Court also reveals a dynamic bent towards a global interpretation of rights. As the Court explained, again in *Makwanyane*’s case, “[i]nternational agreements and customary international law provide

¹⁹⁶ H Botha ‘Comparative Law and Constitutional Adjudication’ (unpublished manuscript, on file with author).

¹⁹⁷ See also *Makwanyane* case (note 72 above) para 144 (where the Constitutional Court described the rights to life and dignity as “the most important of all human rights, and the source of all other personal rights” in the Bill of Rights); and generally A Chaskalson ‘Human Dignity as a Foundational Value of Our Constitutional Order’ (2000) 16 *South African Journal of Human Rights* 193.

¹⁹⁸ *Makwanyane* case (note 72 above) para 329.

a framework within which ... [the Bill of Rights] can be evaluated and understood”¹⁹⁹ and these include both binding and non-binding public international law.²⁰⁰ The *Makwanyane* case itself provides a classic example of the Court’s invocation of international and comparative law. The Court assumed that an expansive comparative constitutional analysis was necessary in determining the constitutionality of the death penalty. It discussed decisions in the US, Canada, Hungary, India, the European Court of Human Rights, and the UN Committee on Human Rights, concluding that the death penalty was unconstitutional for being cruel and inhumane.

In *S v Williams*²⁰¹—the corporal punishment case—the Constitutional Court noted a “growing consensus in the international community” that judicially imposed whipping “offends society’s notions of decency and is a direct invasion of the right which every person has to human dignity”.²⁰² The Court even drew upon decisions of sister institutions in Africa, to wit the Supreme Courts of Namibia and of Zimbabwe, wherein these courts held that corporal punishment constitutes inhuman or degrading punishment.²⁰³ In *S v Ephraim*,²⁰⁴ the Court ruled that “abduction [violates] the applicable rules of international law”.²⁰⁵ The ruling in *S v Ephraim* was particularly significant,

¹⁹⁹ Above, paras 36-7.

²⁰⁰ Cf K O’Regan ‘Human Rights and Democracy—A New Global Debate: Reflections on the First Ten Years of South Africa’s Constitutional Court’ (2004) 32 *International Legal Information* 200 207 (writing: “Like many South African courts before us, we find international law and comparative law most helpful in our jurisprudence. There is an emerging dialogue across continents and nations concerning democracy and human rights and we engage this dialogue in the development of our own Constitution in our own specific context”).

²⁰¹ *S v Williams* 1995 (7) BCLR 861 (CC).

²⁰² As above para 39.

²⁰³ As above paras 31-32 34.

²⁰⁴ *S v Ephraim* 1991 (2) SALR 553 (A).

²⁰⁵ As above, 568.

given the practice in the US where an officer may, in the absence of an express ban treaty, abduct a foreigner and forcibly transport him to the US to stand trial. The US Supreme Court approved such a practice in *United States v Alvarez-Machain*,²⁰⁶ largely because of its traditional reluctance to apply comparative constitutional analysis in interpreting the US Constitution.²⁰⁷

In recent years, the US Supreme Court has tried to redeem itself from this “frozen-in-time” approach to interpretation and American jurists now freely discuss the merits of comparatism.²⁰⁸ *Thomson v Oklahoma*²⁰⁹ was one of the modern pioneer cases in this regard. There, a plurality of the Supreme Court found that the execution of a 15-year-old would violate the Eight Amendment’s prohibition against cruel and unusual punishment. The Court argued that “the conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offence is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.

²⁰⁶ See *United States v Alvarez-Machain* (1992) 504 US 655 670.

²⁰⁷ See Barak (note 58 above) 114 (stressing the reluctance of the US Supreme Court in invoking comparative law); Moon (note 181 above) 240.

²⁰⁸ See eg SD O’Connor ‘Remarks at the Ninety-Sixth Annual Meeting of the American Society of International Law’ (2002) 96 *American Society International Law Proceedings* 350 (“Conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts”); WH Rehnquist ‘Constitutional Courts—Comparative Remarks’ in P Kirchhof & DP Kommers (eds) *Germany and Its Basic Law: Past, Present and Future—A German-American Symposium* (1993) 411 412 (“Now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process”).

²⁰⁹ *Thomson v Oklahoma* (1988) 487 US 815.

Since then, the Supreme Court has warmly embraced the influence of globalisation in American constitutional jurisprudence, for example, in *Grutter v Bollinger*,²¹⁰ in which Justice Ginsburg referenced “the international understanding” concerning the duration of affirmative action programme; *Washington v Glucksburg*,²¹¹ in which Justice Rehnquist, writing for the majority, provided as relevant background a lengthy footnote concerning foreign court decisions on the constitutionality of bans on assisted suicide; and *Thompson v Oklahoma*,²¹² in which the Court stressed the relevance of international views on death penalty. Others are *Lawrence v Texas*,²¹³ in which the Supreme Court struck down a law criminalizing homosexuality for violating the Fourteenth Amendment, citing *Dudgeon v United Kingdom*,²¹⁴ a 1981 European Court of Human Rights decisions that struck down the UK’s criminal sodomy laws; and *Atkins v Virginia*,²¹⁵ in which Justice Stevens, writing for the majority, noted that executing the mentally retarded is a practice that has been “overwhelmingly disapproved” by the “world community”,²¹⁶ a fact which supports the conclusion that such executions are prohibited by the Eight Amendment, being “cruel and unusual punishments”.²¹⁷ Chief Justice Rehnquist exhibited a doublespeak when, in his dissenting judgment, he declared: “I fail to see, however, how the views of other

²¹⁰ *Grutter v Bollinger* (2003) 539 US 306.

²¹¹ *Washington v Glucksburg* (1997) 521 US 702 718 n 16.

²¹² *Thompson v Oklahoma* 487 US 815 830-31.

²¹³ *Lawrence v Texas* (2003) 539 US 558.

²¹⁴ *Dudgeon v United Kingdom* (1981) 45 Eur Ct HR Ser A.

²¹⁵ *Atkins v Virginia* 536 US 304 (2002).

²¹⁶ As above, 316 n 21.

²¹⁷ As above, 307 321.

countries regarding the punishment of their citizens provide any support for the Court's ultimate determination".²¹⁸

There is, indeed, an emerging trend both within and outside the West towards an extraterritorial interpretation of constitutional rights that is both dynamic and edifying. Examples include the Australian case of *Leask v Commonwealth*,²¹⁹ in which Justice Toohey cited the decision of the European Court of Human Rights in *Soering v United Kingdom*²²⁰ concerning extradition to a country permitting use of death penalty. In *Mabo v Queensland [No 2]*,²²¹ the High Court of Australia—the country's highest court—rejected, by a six to one majority, the doctrine of *terra nullius*, supporting its holding with the decision of the International Court of Justice (ICJ) and decisions from Nigeria, Canada, India, New Zealand and the US.²²² In *Australia Capital Television Pty v Commonwealth*,²²³ the Court held as unconstitutional an Act allowing the government to pass legislation limiting or restricting the freedom of communication and broadcasting rights. In arriving at its decision, the Court looked to decisions from Canada, England, the US, and the European Court of Human Rights.²²⁴

Other examples include the Canadian case of *United States v Burns*,²²⁵ which also cited *Soering v United Kingdom*; and the Hong Kong case of *Shum Kwok Sher v*

²¹⁸ As above, 324-25 (stressing, "if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant;" as above).

²¹⁹ *Leask v Commonwealth* (1996) 187 CLR 579 615-16.

²²⁰ *Soering v United Kingdom* (1989) 161 Eur Ct HR Ser A.

²²¹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

²²² As above, 40 48 83-83 123-24 137 164-65.

²²³ *Australia Capital Television Pty v Commonwealth* (1992) 177 CLR 106.

²²⁴ As above, 107 168-69.

HKSAR,²²⁶ in which that country's Court of Final Appeal cited *Hashman & Harrup v United Kingdom*,²²⁷ concerning specificity requirement of laws constraining freedom of speech. These courts also consult the jurisprudence of other municipal courts in constitutional interpretations. In *The Queen v Keegstra*,²²⁸ the Canadian Supreme Court considered whether the Canadian criminal code prohibited hate speech. In interpreting the Charter of Rights and Freedoms, the Court turned to American jurisprudence as well as international human rights law for assistance. Chief Justice Dickson justified such an approach by asserting that "international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective".²²⁹

Some constitutional courts in Africa have also participated in the international dialogue. In *Mwellie v Ministry of Works*,²³⁰ Namibia's Constitutional Court considered decisions from India, US, Canada, England, Malaysia, South Africa and the European Court of Human Rights. African judges as a whole should promote judicial comity by opening their minds to new approaches, mindful that "other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise

²²⁵ *United States v Burns* [2001] 1 SCR 283 para 53.

²²⁶ *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793.

²²⁷ *Hashman & Harrup v United Kingdom* (1999) Eur Ct HR Ser A.

²²⁸ *The Queen v Keegstra* [1990] 3 SCR 697.

²²⁹ As above, 749-50. See, in general, L LeBel & G Chao 'The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fushion? Recent Developments and Challenges in Internalizing International Law' (2002) 16 *Supplement Constitutional Law Review* (2002) 23 45; GV la Forest 'The Expanding Role of the Supreme Court of Canada in International Law Issues' (1996) 34 *Canadian Yearbook of International Law* 89 90-91.

²³⁰ *Mwellie v Ministry of Works* [1995] 4 LRC 184.

each day, from which we can learn and benefit”.²³¹ They should use their best skills and judgment to fit human rights law to new challenges that an evolving democratic society leaves at the doors of their courthouses.²³² Convergence, not divergence, has been the mega-trend since the early 1980s and beyond. It is self-defeating for judges to stick to an unchanging line in a radically changed world.

Human rights law can only develop if its jurisprudence is a dialogue rather than a monologue. If applied more frequently, African courts could use international and comparative norms to make justiciable many of the socio-economic rights that some African constitutions regard as mere “directive principles” of state policies. Of course, judges should necessarily take the history and changing conditions of their communities as points of departures, but they should not stop there; they should pay attention to legal developments in the rest of the world and to their role in keeping their countries in step with these developments. As the US Supreme Court stated, in *Lawrence v Texas*,²³³ “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom”.²³⁴

²³¹ SD O’Conner ‘Broadening Our Horizon: Why American Judges and Lawyers Must Learn About Foreign Law’ *International Judicial Observer* June 1997 2 cited in RB Ginsburg ‘Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication’ (2004) 22(2) *Yale Law and Policy Review* 329 337.

²³² See JS Kaye ‘Delivering Justice Today: A Problem-Solving Approach’ (2004) 22(1) *Yale Law and Policy Review* 125.

²³³ *Lawrence v Texas* (2003) 123 S Ct 2472.

²³⁴ As above, 2482.

The African Commission as a Catalyst

As a regional mechanism for the promotion and protection of human rights, the African Commission has come a long way since its inauguration in 1987. In its early years, the Commission was more careful than courageous and appeared to have been overwhelmed by the sheer width and breadth of its mandate.²³⁵ Its decisions were crude and queer, much like the early drawings of children. From these initial faltering steps, the Commission has walked and worked firmly to establish itself as a respectable human rights institution. It now interprets its mandate boldly and creatively. It has created a fairly accessible procedure for consideration of individual communications and has solved many of the initial procedural issues sensibly, such as those relating to admissibility.²³⁶ Its jurisprudence on local remedies is comparable to those developed by international tribunals elsewhere.²³⁷ Its framework for state reports on social rights appears generally comprehensive, though it could be improved upon to take account of changing needs.

Like some of the tribunals earlier highlighted, the African Commission has relied on international human rights jurisprudence to extend the paradigm of human rights to basic needs of peoples, thereby departing from the original paradigm that focused on negative

²³⁵ See eg J Oloka-Onyango 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa' (2003) 18 *American University International Law Review* 851 912 (noting that the Commission initially lacked the "creative intellectual flair that is always essential to turn the black letter of the law into an effective instrument to address the lived reality of the dispossessed").

²³⁶ See I Osterdahl *Implementing Human Rights in Africa: The African Commission on Human and Peoples' Rights and Individual Commissions* (2002) 189.

²³⁷ For an analysis of the local remedies rule under the African Charter, see NJ Udombana 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American Journal of International Law* (2003) 1.

freedoms. The African Charter enjoins the Commission to engage in international dialogue in its interpretive functions. The Charter provides that the Commission could—

draw inspiration from international law on human and peoples' rights, the Charter of the United Nations, the ... [Constitutive Act of the AU], the Universal Declaration of Human Rights, other instruments adopted by the United Nations and African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members.²³⁸

In *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*,²³⁹ the African Commission created a right to housing even in the absence of an express guarantee in the African Charter. According to the Commission:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the

²³⁸ African Charter art 60.

²³⁹ See eg *Social & Economic Rights Action Centre v Nigeria* Comm No 155/96 2001–2002 African Annual Activity Report Annex V [hereinafter *SERAC* case].

combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing ...²⁴⁰

The problem that remains is the old one: states' unwillingness to take seriously a Commission they voluntarily created. African states' record in implementing decisions of the Commission is abysmal, except for very limited exceptions. At each yearly summit of the OAU/AU Assembly, African leaders adopt the "Annual Activity Report" of the Commission, "commend[...] it for the excellent work accomplished during the past year," and authorize its publication;²⁴¹ in short, they do everything to flatter the Commission except to respect its recommendations. Sadly, the Commission is normatively deficient in sanctioning recalcitrant states.²⁴²

Everyone hopes that the African Human Rights Court, established to "complement the protective mandate of the African Commission",²⁴³ will make a positive contribution to the present unsatisfactory state of affairs. This optimism rests on the enhanced normative and structural framework of the Court, which, in principle, is not handicapped with the same deficiencies and weaknesses that beset the Commission. The Court is empowered to offer remedies to victims of human rights violations. Its Protocol provides that, "[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair

²⁴⁰ As above para 60.

²⁴¹ See eg Decision on the 16th Annual Activity Report of the African Commission on Human and Peoples' Rights AU Doc Assembly/AU/7 (II) (2003) para 1.

²⁴² See EA Ankumah *The African Commission on Human and Peoples' Rights* (1996) 108–09.

²⁴³ See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU Doc OAU/LEG/MIN/AFCHPR/PROT (III) [hereinafter Human Rights Protocol] art 2.

compensation or reparation”.²⁴⁴ States Parties to the Court’s Protocol undertake “to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution”.²⁴⁵ The AU Executive Council, which replaces the OAU Council of Ministers, will monitor execution of the Court’s judgment on behalf of the AU Assembly.²⁴⁶ The Protocol enjoins the Court, in its annual report to the Assembly, to “specify, in particular, the cases in which a State has not complied with the Court’s judgment”,²⁴⁷ presumably to enable the Assembly to apply political and economic pressure on the recalcitrant state. These and similar provisions are intended to brighten the human rights landscape in Africa, but the effectiveness of the Court equally depends on states’ attitudes toward it.

Pending the establishment of the Human Rights Court,²⁴⁸ or in spite of it, the African Commission should continue to develop human rights jurisprudence through communications lodged before it. Some commentators believe that advancing human rights jurisprudence in Africa will remain the greatest challenge facing the Commission in the years to come.²⁴⁹ Given the minimal number of communications on socio-economic rights, compared to their civil and political counterparts, the Commission

²⁴⁴ Above, art 27(1).

²⁴⁵ Above, art 30.

²⁴⁶ Above, art 29(2).

²⁴⁷ Above, art 31.

²⁴⁸ The AU took a giant step towards making the human rights court a reality when its Assembly, at its 6th Ordinary Session in Khartoum, Sudan, in January 2006, elected the judges of the Court. The list of the elected judges and their tenure are: Sophia A.B. Akuffo (2-year term); G.W. Kanyiehamba (2-year term); Bernard Makgabo Ngoepe (2-year term); Jean Emile Somda (2-year term); Hamdi Faraj Fanoush (4-year term); Kelello Justina Mafoso-guni (4-year term); Jean Mutsinzi (6-year term); Fatsah Ouguergouz (4-year term); Modibo Tounry Guindo (6-year term); El Hadji Guisse (4-year term); and Gérard Niyungeko (6-year term). See Decision on the Election of Judges of the African Court on Human and Peoples’ Rights AU Assembly 6th Ord Sess AU Doc Assembly/AU/Dec100 (VI) (Jan 2006) para 2.

should additionally develop general comments on these rights, but such comments should not merely duplicate those of the existing UN human rights bodies. The Commission itself accurately noted that the “uniqueness of the African situation and special qualities of the African Charter” impose important tasks on judicial institutions, one of which is to interpret the Charter in a manner that is responsive to African circumstances.²⁵⁰ General comments are not hard laws and so are not imperative or obligatory, but they could provide materials for human rights advocacy and mobilization.

The essential first step towards promoting the realization of socio-economic rights is diagnosis and knowledge of existing situation. The Commission should intensify its monitoring of actual situations with respect to each right in order to discover the extent to which it is, or is not, being enjoyed by intended beneficiaries. Such direct evidence could help the Commission to scrutinize government policies on socio-economic rights. The Commission should appoint a Special Rapporteur on socio-economic rights to coordinate activities on these rights. The Rapporteur should liaise with States Parties and other stakeholders on the Commission’s behalf. This is particularly necessary because the Commission does not meet regularly.

The Commission should also work closely with National Human Rights Institutions (NHRIs) to monitor states’ compliance with the Charter’s obligations. The Commission itself acknowledges that—

²⁴⁹ See Pityana ‘Preface’ to R Murray *The African Commission on Human and Peoples’ Rights and International Law* (2000) vi.

²⁵⁰ See *SERAC* case (note 239 above) para 68.

the mission aimed at promoting human and peoples' rights . . . would be carried out through the assistance and support of national or regional committees established for that purpose, and composed of eminent personalities, which should also help governments solve their national or local problems relevant to human rights, thus promoting a better awareness of issues related to human rights.²⁵¹

The Commission should work with states that have not yet established NHRIs and encourage them to do so and to fund these institutions in order to fulfil their mandates. NHRIs must be quarantined from executive and legislative controls, a problem that confronts most public institutions in Africa. NHRIs have potentially crucial roles to play in promoting and ensuring the promotion and protection of all human rights. Unlike the African Commission, NHRIs are grass-roots organizations; they are closer to national governments and are best suited, at least in principle, to monitor states' implementation of human rights. NHRIs can take full account of international standards applicable to the country concerned only if they enjoy an important degree of autonomy.

The Committee on Economic, Social and Cultural Rights (CESCR) has indicated the types of activities that can be, and in some instances already have been, undertaken by NHRIs on socio-economic rights. They include: “[t]he promotion of educational and information programmes designed to enhance awareness and understanding of [egalitarian] rights, both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labour movement; [...] [t]he scrutinizing of existing laws and administrative acts, as well as draft bills and other

²⁵¹ Resolution on the Establishment of Committees on Human Rights or Other Similar Organs at National, Regional or

proposals, to ensure that they are consistent with the requirements of the [ICESCR]; [and] [...] [p]roviding technical advice, or undertaking surveys in relation to [egalitarian] rights.”²⁵² Others are “[t]he identification of national-level benchmarks against which the realization of Covenant obligations can be measured; [...] [c]onducting research and inquiries designed to ascertain the extent . . . [of] realiz[ation of particular egalitarian rights], either within the State as a whole or in areas or in relation to communities of particular vulnerability; [...] [m]onitoring compliance with specific rights recognized under the Covenant and providing reports thereon to the public authorities and civil society; and [...] [e]xamining complaints alleging infringements of applicable [egalitarian] rights standards within the State”.²⁵³ Each of these targets is relevant, *mutatis mutandis*, to the African human rights system.

The African Commission should create opportunities for periodic interactions with national courts to update national judicial officers on the Commission’s emerging human rights jurisprudence and those of similar institutions. Such interactions will also give these officers opportunities to compare notes on best practices in the interpretation and application of socio-economic rights. The Commission should also collaborate with relevant civil society organizations (CSO) to publish and disseminate its decisions in the form of law reports. Agreed, some of the Commission’s decisions have been posted on its web site—several others are yet to be posted—but majority of Africans are unable to access these decisions largely because the Internet is still a luxury good in most of Africa,

Sub-Regional Level (1989) Second Annual Activity Report of the African Commission 1988–1989 Annex VIII pmb1.

²⁵² See ECOSOC Commission on Economic Social & Cultural Rights Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Doc E/C12/1998/25 (10 Dec 1998) para 3.

²⁵³ Above.

even in urban areas. The Commission must find a more efficient way of circulating its decisions to a larger audience in Africa, including those in rural areas. Information and documents relating to human rights are too crucial to be accessible only by ‘experts’. The Commission’s decisions on socio-economic rights could serve the purpose of domestic litigation and provide tools for political mobilisation and campaigns. If effectively disseminated, such decisions could revolutionize struggles for a better life in Africa.²⁵⁴

4.4 Socio-economic Rights and Limits of Judicial Process

The analysis in the last two segments demonstrates that it is possible for courts in Africa to accommodate the notion of a strong interpretive obligation, that is, to construe domestic law consistently with international law, including unincorporated conventional law. The liberal attitudes of the African Commission and such municipal judicial institutions, like the South African Constitutional Court and Indian Supreme Court, should inspire African judges, particularly in those countries where there are no constitutional guarantees of socio-economic rights or where these rights are regarded merely as fundamental objectives and directive principles of state policies.

When allowances have been made for judicial creativity, problems still remain on the application of judicial remedies to socio-economic rights, including questions of judicial competency and accountability and methodology. Judicial decisions with large-scale budgetary effects are problematic, creating tensions with democratic self-governance. Decisions about healthcare funding involve difficult decisions at the political level and

²⁵⁴ Cf R Kunnemann ‘A Coherent Approach to Human Rights’ (1995) 17 *Human Rights Quarterly* 323 332 (arguing that socio-economic rights provide “the only means of self-defense for millions of impoverished and marginalized individuals and groups all over the world”).

functional levels—fixing the health budget and deciding what priorities should be met.

Lord Lester and O’Cinneide share in these concerns:

There are limits to what can be achieved by the judicial process in implementing fundamental rights. Courts cannot provide a remedy for every injustice. Judges lack the constitutional authority as well as the expertise to make political decisions about the raising and disposition of public revenue, or as to how public programmes should be designed and executed. The judicial branch cannot arrogate to itself the roles of the legislature or executive branches without usurping their separate and distinct public powers.²⁵⁵

We concede that it is not the function of a court to govern a country. Furthermore, a judicial institution should be slow to interfere with rational decisions by the political organs and other authorities having responsibilities to deal with resource-related matters. Happily, the available jurisprudence shows that judges are conscious of limitations inherent in deploying the judicial process to advance socio-economic rights. So far, they have avoided going into detailed determination of policy and practice. One could reasonably assume that they will continue to define and observe appropriate parameters for the judicial function.²⁵⁶

²⁵⁵ Lord Lester & C O’Cinneide ‘The Effective Protection of Socio-Economic Rights’ in *Economic, Social & Cultural Rights in Practice* (note 1 above) 17 19.

²⁵⁶ See An-Na’im (note 1 above) 7 (stressing, “the risk of judicial usurpation of the role of elected officials should be checked through practical adjudication, instead of denying a whole group of rights any possibility of judicial enforcement because of that risk”).

The South African Constitutional Court has particularly been exemplary in its efforts to balance state and individual interests while sensitive to separation of power concerns. In the *TAC* case,²⁵⁷ the Court reiterated the standard for judicial review thus:

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focussed role for the courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determination of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.²⁵⁸

In the *Soobramoney* case,²⁵⁹ the issue was whether a public hospital had violated the South African Constitution for failing to provide renal dialysis services to a terminally ill man who suffered from diabetes, ischemic heart disease, and cerebro-vascular disease. Soobramoney claimed that the hospital's refusal to treat him violated his right to health care and emergency medical treatment.²⁶⁰ The South African Constitution provides that

²⁵⁷ See *TAC* (note 90 above).

²⁵⁸ Above, para 38. Cf *Grootboom* case (note 78 above) para 41 ("A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met").

²⁵⁹ *Soobramoney* case (note 64 above).

²⁶⁰ See above, para 5-7.

“[e]veryone has the right to life” and that “[n]o one may be refused emergency medical treatment”.²⁶¹ The hospital had produced evidence before the Court that it prioritised treatment for non-terminal patients because dialysis was a scarce resource.

The Court rejected the claimant’s “emergency” assertion.²⁶² Relying on the *Certification* case,²⁶³ the Court argued that the claim fell squarely under a more relevant right of access to healthcare facilities, also guaranteed in the Bill of Rights. It, however, observed that obligations imposed on the state with respect to these rights were dependent on available resources, and that in the circumstances of South Africa, an “unqualified obligation” to meet the health care and other needs “would not presently be capable of being fulfilled”.²⁶⁴ The Court rejected the “broad construction” of sub-section (3) of section 27—that emergency medical care included ongoing treatment of chronic illness—and argued that such a construction would make it “substantially more difficult” for the state to meet its primary obligation under sub-sections (1) and (2) to provide health care services to “everyone” within its available resources. It would reduce the resources available to the state for purposes of preventative health care and treatment of curable diseases.²⁶⁵ In his concurring judgment, Justice Sachs noted that rights, by their very nature, are shared and interdependent, meaning that a court must strike appropriate balances between the equally valid entitlements or expectations of a multitude of claimants. Such an exercise, according to him, should not be seen as imposing limits on

²⁶¹ See Constitution of South Africa secs 11 27(3).

²⁶² See *Soobramoney* case (note 64 above) para 21.

²⁶³ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 [hereinafter *Certification* case].

²⁶⁴ *Soobramoney* case (note 64 above) para 11.

those rights but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.²⁶⁶

After the *Soobramoney* decision, some commentators feared that the Constitutional Court would render the rights provisions in the South African Constitution ineffective.²⁶⁷ Others argue that, from the standpoint of judicial precedent, *Soobramoney* did not contribute much to the understanding of socio-economic rights, neither did it “lay down any guidelines that could be followed when interpreting socio-economic rights so as to illuminate and indigenise jurisprudence on socio-economic rights”.²⁶⁸ The present writer takes the view that the Court was simply balancing competing interests and, in the process, dispelling fears about its inability to make policy choices in constitutional interpretation and its application to socio-economic rights. The Court successfully blended considerations of benefits and costs and simple cost efficiency within a policy perspective with attention to its limited institutional competence to interfere with “rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters”.²⁶⁹ The State, the Court stressed, must “manage its limited resources” in order to address the many claimants in need of access to health care, housing, and social security, all aspects of the right to human life.²⁷⁰

²⁶⁵ As above, para 20.

²⁶⁶ As above, para 54 (arguing, in relation to intervention by courts on such matters, that “institutional incapacity and appropriate constitutional modesty require us to be especially cautious”. As above, 58).

²⁶⁷ E Bazelon ‘After the Revolution’ *Legal Affairs* Jan/Feb 2003 25 28. See also F Michelman ‘The Constitution, Social Rights and Reason: A Tribute to Etienne Mureinik’ (1998) 14 *South African Journal of Human Rights* 499 (for a critique of some parts of the judgment).

²⁶⁸ C Ngwena & R Cook ‘Rights Concerning Health’ in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 135 137.

²⁶⁹ *Soobramoney* case (note 64 above) para 29.

²⁷⁰ As above, para 31.

Soobramoney illustrates that a constitutional court can satisfactorily navigate its way through socio-economic rights claims without violating separation of powers and legislative competence.²⁷¹

As regards extraterritorial interpretation of rights, a court must avoid the danger of unscientific juridical comparison by interpreting constitutional rights in ways that are system-specific. The South African Constitutional Court has repeatedly stressed that, in the final analysis, it is the South African Constitution that must be interpreted and that its provisions must be placed within the context of South African society.²⁷² In the *Makwanyane* case, the Court held in balance its references to foreign jurisprudence with its reliance on indigenous African concept of *ubuntu*, which was taken to signal values of respect, dignity, compassion and solidarity.²⁷³ Another self-limitation on the judicial process is the imperative of maintaining uniformity and predictability to enable litigants and advocates alike rely on the continued application of the same rules. As Cody Moon pointedly asks, “when one constitutional court decides an issue one way and another reaches a different conclusion, who determines which court is correct?”²⁷⁴

4.5 Conclusion

The full realization of socio-economic rights requires an institutional paradigm shift, including interpretative shifts by the judiciary. Africa’s judiciaries should ignore abstractions and give citizens a new sense of their governments’ concerns for their

²⁷¹ See MS Kende ‘The South African Constitutional Court’s Embrace of Socio-Economic Rights: A Comparative Perspective’ (2003) 6 *Chapman Law Review* 137 147.

²⁷² See eg *Williams* case (note 201 above) paras 50 51.

²⁷³ See *Makwanyane* case (note 72 above) paras 130-31 223-27.

welfare. They should move beyond the present judicial schizophrenia and use interpretative apparatuses that are different from those derived from a traditional premise of parliamentary or legislative sovereignty.²⁷⁵ They should develop appropriate enforcement apparatus for each human right. There is no monolithic model of judicial enforcement for all rights, however classified and regardless of local context.²⁷⁶ Human rights practitioners, on their part, must vary their scope and dynamics of litigation from one context to another rather than becoming settled in one methodology. Litigation and adjudication of socio-economic rights must be seen as a process, not an event.²⁷⁷

There is a groundswell of public demand for the effective realization of socio-economic rights in Africa. Africans deserve institutions that are flexible and responsive to the demand of the times. Being an integral and necessary part of constitutional engineering in Africa, and conscious of the great disparities in wealth in most countries, courts should make socio-economic rights to work. They must identify themselves with their “brethren” in order to advance peoples’ aspirations in their judgments. Strong and effective judiciaries are vital not only to the rule of law but also to economic development. These institutions deserve the respect and support of Africans only to the extent they contribute meaningfully to realize *all* human rights.

Domestic courts should emulate the African Commission’s holistic approach when interpreting and applying relevant human rights instruments. An integrative interpretive

²⁷⁴ Moon (note 181 above) 245.

²⁷⁵ For a contrary opinion, see J Griffith ‘Making Rights Work’ in *Making Rights Work* (note 63 above) 88 96 (“The elected representatives of the people must be entrusted with the ultimate decision-making authority. Higher-order people enforcing higher-order values are no alternative”).

²⁷⁶ See An-Na’im (note 1 above) 7.

²⁷⁷ As above, 16.

methodology will greatly enhance the development of human rights jurisprudence in Africa. If the judiciary does not take socio-economic rights seriously, then it does not take law seriously either—to paraphrase Dworkin.²⁷⁸ A judiciary that is complicit in the violation of human rights, whether civil and political or socio-economic, taints public confidence in domestic notions of justice.

²⁷⁸ Cf Dworkin *Taking Rights Seriously* (note 59 above) 205.

Chapter Five

EXTENDING THE FRONTIERS OF OBLIGATIONS: TRANSNATIONALS AND SOCIO-ECONOMIC RIGHTS IN AFRICA

5.1 Introduction

Classical international law evolved as a state-centric phenomenon, recognising states as its sole subjects with direct rights and responsibilities.¹ Individuals were merely objects—foams on the waves of international law and politics. International law also excluded international organisations and transnational corporations (TNCs)² from actively shaping international relations, both normatively and institutionally. The assumption was that only two political entities, equal in law and similar in form, could make a claim at international level. This assumption further suggests that non-state actors have no obligations and are not accountable for human wrongs. Given the complexity of contemporary international political and economic relations, the question is whether it is right to stick to this orthodoxy.

¹ See R McCorquodale 'The Individual and the International Legal System' in M Evans (ed) *International Law* (2003) 301; and A James *Sovereign Statehood: The Basis of International Society* (1986).

² I employ the phrase 'transnational corporations' (TNCs) holistically to include 'multinational corporation', though controversy surrounds their varying usages. See, in general, MT Kamminga & S Zia-Zarifi (eds) *Liability of Multinational Corporations under International Law* (2000); and P Muchlinski *Multinational Enterprise and the Law* (1995).

Should international human rights law extend obligations to non-state actors, in particular TNCs and international economic institutions (IEIs). Do these entities possess the personality and capacity to act internationally? On what authority could such capacity rest? To what extent should such obligations extend to socio-economic rights? In what ways do such obligations bind or constrain the duty-bearers? How can domestic and international tribunals enforce obligations on non-state actors? This Chapter investigates the horizontal obligations of non-state actors and the legal basis for holding such actors liable for human wrongs or for insisting that non-state actors should undertake certain positive measures to advance human rights.

In the context of Africa, I argue that meeting human security and achieving egalitarian society demands the active involvement of all actors, including non-state actors, and that such involvement could be justified legally and morally. I start by providing reasons to jettison the state versus non-state orthodoxy in relation to human rights obligations. I proceed to examine how non-state actors, in particular TNCs, violate human rights in Africa. I, thereafter, interrogate the emerging norms on corporate human rights governance.

5.2 Why State v Non-state Orthodoxy has Become Unrealistic

Orthodox human rights framework, as represented in the international bill of rights and allied instruments, sought to protect the individual primarily from state absolutism, understandably because the state was the repository of power. This orthodoxy also developed in an era when international business transaction and economic interdependence were less prominent, but it has become obsolete in contemporary world

of the 21st century.³ “The international legal order”, says Zolo, “is quickly adapting to a more and more ‘global’ scenario, where state sovereignty is declining, new actors are surfacing and Grotius’ principle that individuals are not subjects of international law is withering away”.⁴

Some commentators even view the traditional “subject/object” characterisation as unhelpful. According to Higgins, “the whole notion of ‘subjects’ and ‘objects’ has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint”.⁵ In the realm of human rights, Franck avoids the legal subjectivity altogether and insist on a moral priority for the individual as a rights claimant with regard to groups and states.⁶ Others insist that a functional and constitutional approach will remove the subject/object rigidity.⁷ All of this approaches agrees with the ICJ’s opinion in the *Reparations case*:⁸ “The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community”.⁹

³ See SI Skogly ‘Economic and Social Human Rights, Private Actors and International Obligations’ in MK Ado ed *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 239 244.

⁴ D Zolo ‘Peace Through Criminal Law?’ (2004) 2 *Journal of International Criminal Justice* 727 727.

⁵ R Higgins *Problems and Process: International Law and How We Use It* (1994) 49.

⁶ T Franck ‘Individuals and Groups of Individuals as Subjects of International Law’ in R Hofmann (ed) *Non-State Actors as New Subjects of International Law: International Law—From the Traditional State Order Towards the Law of the Global Community* (1999) 97.

⁷ See eg R Wedgwood ‘Legal Personality and the Role of Non-Governmental Organisations and Non-State Political Entities in the United Nations System’ in Hofmann (note 6 above) 21; D Thurer ‘The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of States’ in Hofmann (above) 37 53.

⁸ *Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174.

⁹ Above, 179.

The involvement of non-state actors has moved from the informal to the formal plane, where critical changes are taking place. These actors are struggling, often successfully, to find voice at the international scene, either through participation in the elaboration of norms or through access to international tribunals. The idea that these actors should assume obligations in the field of human rights is gaining wide acceptance,¹⁰ though the global community is yet to make a leap from norm-candidates to binding norms.¹¹ According to Clapham, non-state actors generate certain rights and obligations “because the international legal order considers these rights and obligations as generally applicable and binding on every entity that has the capacity to bear them”.¹²

Several factors account for this paradigm shift, among them a rethinking of the public/private distinction. Privatisation—“a shift toward provision by non-state organisations of certain classes of goods and services, or performance by those

¹⁰ See, in general, A Clapham *Human Rights Obligations of Non-State Actors* (2006); JA Zerk *Multinationals and Corporate Social Responsibility* (2006); N Wahi ‘Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability’ (2006) 12 *University of California Davis Journal of International Law and Policy* 331; D Aguirre ‘Multinational Corporations and the Realisation of Economic, Social and Cultural Rights’ (2004) 35 *California Western International Law Journal* 53 (examining the relationship between operations of MNCs and the realisation of socio-economic rights); F Megret & F Hoffmann ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ (2003) 25(2) *Human Rights Quarterly* 281; A Ramasastry ‘Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labour Cases and Their Impact on Liability of Multinational Corporations’ (2002) 20 *Berkeley Journal of International Law* 91 96; J Paust ‘Human Rights Responsibilities of Private Corporations’ (2002) 35 *Vanderbilt Journal of Transnational Law* 801 (examining corporate liability under human rights laws); SR Ratner ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale Law Journal* 443 (positing a theory of corporate responsibility for human rights protection); JC Anderson ‘Respecting Human Rights: Multinational Corporations Strike Out’ (2000) 2 *University of Pennsylvania Journal of Labour and Employment Law* 463 467; C Jochnick ‘Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights’ (1999) 21 *Human Rights Quarterly* 56 63; MK Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (1999); JJ Paust ‘The Other Side of Rights: Private Duties under Human Rights Law’ (1992) 5 *Harvard Human Right Journal* 51; T Meron *Human Rights in Internal Strife: Their International Protection* (1987) 34; FC Newman & K Vasak ‘Civil and Political Rights’ in K Vasak (ed) *The International Dimensions of Human Rights* (1982) 125 152; and Y Dinstein ‘International Criminal Law’ (1975) 5 *Israel Yearbook on Human Rights* 55.

¹¹ Certain moral and legal principles or claims exist in international law—as well as domestic law—as candidates for the office or status of standards rather than as standards themselves. These lego-moral principles or claims are really nominees offered by nation-states to potential voters, that is, the states. These moral and legal principles we call norm-candidates. Although many such candidates are sometimes offered, not many are chosen as norms, and even when some are chosen, that choice often takes many years. See WF Langley ‘Children as Subjects of International Law: The Conquest of the Ideology of Care-Taking’ (1999) *Review of International Affairs* 40 43.

organisations of certain classes of functions, for the provision or performance of which government offices and agencies are exclusively or primarily responsible”—has blurred the public/private divide.¹³ Another is the realization that the state is no longer the only predator to be contained. The powers that private institutions—voluntary associations, trade unions, corporations, multinationals, universities, and churches—wield are, in principle, as oppressive and potentially as illegitimate as state power.¹⁴

The end of the Cold War led to the emergence of a New World Order,¹⁵ which shifted the balance of power between states, with wider repercussions on the pre-existing Westphalia international order, what Hessbruegge calls “a ‘medievalization’ of international relations”.¹⁶ In this brave new world, states and non-states increasingly interconnect and a system of global governance now has superseded the strict allocation of authority associated with the Westphalian order, thereby eroding and complicating the understanding of traditional categories. Global markets have expanded significantly due to trade agreements, bilateral investment treaties, and domestic liberalization and privatization. Globalisation increases vulnerability, as states helplessly open up their local

¹² Clapham (note 10 above) 87.

¹³ Wahi (note 10 above) 381-82.

¹⁴ See A Cockrell *Private Law and the Bill of Rights: A Threshold Issue of Horizontality*, in *Bill of Rights Compendium* (2004) 3A-4.

¹⁵ The emergence of the New World Order can be traced to the break-up of the bipolar configuration of power between the West, dominated by the United States, and the East, dominated by the then USSR. The break-up of the USSR, the fall of the Berlin Wall, and the Gulf War are symbols of the implementation of this New World Order. See P Lauderdale & P Toggia ‘An Indigenous View of the New World Order: Somalia and the Ostensible Rule of Law’ (1999) 34 *Journal of Asian & African Studies* 157 158.

¹⁶ JA Hessbruegge ‘Human Rights Violations Arising from Conduct of Non-State Actors’ (2005) 11 *Buffalo Human Rights Law Review* 21 21 (“The Westphalian order, consisting of one layer of states, is increasingly replaced by a multi-layered system similar to the feudalist medieval European empires, in which power was distributed among various layers of noblemen with the emperor having only partial control over his lands”. See also JT Mathews ‘Power Shift’ (1997) 76(1) *Foreign Affairs* 50 61.

economies to global markets and align them with global policies by lowering custom tariffs or making labour markets more flexible.

In most of Africa, TNCs have literally invaded domains hitherto controlled by states, made possible by the weak post-colonial institutions. Many TNCs have moved some of their major operations from countries with strict regulations to those with less or, sometimes, no regulations. Together with IIEs, TNCs have much control over economic activities in developing countries. Their rules and macroeconomic policies play a significant role in shaping and directing globalisation. They overrun—yes, they overrun—dynamic sectors of many national economies such as extractive industry, pharmaceuticals, telecommunications, information technology, banking and finance, and insurance. They take independent decisions and actions—or in conjunction with states and international organizations—that raise controversial labour, environmental, and justice issues, with implications on living conditions of millions.¹⁷

TNCs generate annual wealth that far exceeds most countries' GDP. The World Bank reports that “the combined revenues of just General Motors and Ford ... exceed the combined GDP for all of sub-Saharan Africa and fifty one of the largest one hundred economies are corporations”.¹⁸ Similarly, a 2000 study comparing corporate sales and country GDP revealed that 51 of the 100 largest economies in the world are corporations and only 49 are countries.¹⁹ Most TNCs are more powerful than their host governments²⁰

¹⁷ See L Reed ‘Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?’ (2002) 96 *American Society International Law Proceedings* 219–224. See, in general, G Kelley ‘Multilateral Investment Treaties: A Balanced Approach to Multilateral Corporations’ (2000) 39 *Columbia Journal of Transnational Law* 483.

¹⁸ World Bank *World Development Report 1996* (1997).

¹⁹ See S Anderson & J Cavanagh *Institute for Policy Studies Top 200: The Rise of Corporate Global Power* (2000) 3 available at http://www.ips-dc.org/downloads/Top_200.pdf (“General Motors is now bigger than Denmark;

and are capable of destabilizing or, at the minimum, holding these governments hostage at will. Such dangers make internal regulation of markets by African states difficult, if not impossible. “Every African government”, says Ihonvbere, “has reason to watch its back”.²¹

The next segment examines how TNCs violate human rights in Africa.

5.3 How TNCs Violate Human Rights in Africa

Africa is a continent where all kinds of hyenas attempt to get their teeth into its “rotten” (especially extractive) meat; where TNCs benefit from access to rich natural resource areas while local populations suffer from ethnic cleansing, torture and rape; where TNCs commit crimes against humanity with impunity in their host (or hostage?) states, crimes that they cannot contemplate, let alone attempt, in their home states; and where people get hurt and no one notices or feels responsible. Many Africans have been forcefully evicted or displaced due to the so-called large-scale development projects—such as dam-building and other energy projects—contracted out to TNCs. Yet, the Vienna Declaration and Program of Action proclaims that, “while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights”.²²

DaimlerChrysler is bigger than Poland; Royal Dutch/Shell is bigger than Venezuela; IBM is bigger than Singapore; and Sony is bigger than Pakistan”).

²⁰ See NJ Udombana ‘How Should We Then Live? Globalization and the New Partnership for Africa’s Development’ (2002) 20 *Boston University International Law Journal* 293 297 (“New global, mostly private, actors have emerged and are wielding greater influences”).

²¹ JO Ihonvbere *Economic Crisis, Civil Society, and Democratization: The Case of Zambia* (1996) 224.

²² Cf Vienna Declaration and Program of Action 12 July 1993 Part I para 10 A/CONF157/23 (1993) 32 *International Legal Materials* 1661.

In Angola, private security companies, representing large diamond corporations, continue to brutalize local populations in the name of fighting illegal artisanal diamond mining known as *garimpo*. Hundreds of thousands of Angolan locals in the diamond-rich, employment-poor provinces are considered *garimpeiros* because the land on which they have lived and worked as small-scale traditional miners for centuries has been redefined as concessions, or “reserved” areas for corporations.²³ In the diamond-rich Lundas provinces, even simple acts of farming, fishing or bathing in a river can result in cruel punishment by private security companies.²⁴

In some other countries, governments virtually cede sovereign and economic rights to TNCs, which create a state within a state. In 2005, steel magnate Lakshmi Mittal signed a contract with then Liberia’s transitional government giving his company virtual control of the vast Nimba concession area, including the country’s longest rail line and the port facilities in the town of Buchanan. In return, the company will provide such services as schools and health facilities for people in the area.²⁵ In the DR Congo, local armed groups fighting for control of gold mines and trading routes commit war crimes and crimes against humanity using profits from gold to fund their activities and buy weapons. AngloGold Ashanti, which is part of Anglo American international mining conglomerate, has reportedly developed links with one such murderous group—the Nationalist and Integrationist Front (FNI). It helps the group to access the gold-rich mining site around

²³ See R Marques ‘A New Diamond War’ *Washington Post* 6 Nov 2006 A21 (reporting on numerous cases of human rights abuses by private security companies in Angola, including flogging, humiliation, torture, sexual abuses, assassinations, sadistic rituals, and cutting off a trouser leg of citizens as a warning). See, in general, R Marques *Operation Kissonde: The Diamonds of Humiliation and Misery* (2006) (reporting on how guards working for three companies in the Cuango municipality in Lunda Norte province engage in beatings, humiliation, sexual abuse and enforced labour).

²⁴ Marques ‘A New Diamond War’ (note 23 above).

²⁵ See B Law ‘Liberia’s challenge’ *BBC News Online* 2 Nov 2006.

the town of Mongbwalu in the northeastern Ituri district and provides other financial and logistical support.²⁶ The company won mining rights to the vast gold concession in 1996 but could not start mining because of the war. A peace agreement was signed and a transitional government established in Kinshasa, but the central government failed to establish control of Ituri, leaving the areas around Mongbwalu in the hands of the FNI armed group.²⁷

For decades, Nigeria's Niger Delta²⁸ has been the site of major confrontations between its inhabitants and state security forces, resulting in extra-judicial executions, arbitrary detentions, and draconian restrictions on rights to freedom of expression, association, and assembly. On November 10, 1995, the Nigerian Government executed Ken Saro-Wiwa—then leader of Movement for the Survival of the Ogoni People (MOSOP)—and eight other Ogoni indigenes, after a kangaroo trial. That sadistic execution marked a turning point in the struggle between human wrongs and rights in the Niger Delta. The genesis of the crisis is the utter insensitivity of TNCs that extracts an estimated 2.3 million barrels of Nigeria's oil reserves daily from the delta. These TNCs—Shell, Chevron, Mobil (part of ExxonMobil), Texaco (part of Chevron), Total and Elf (part of Total)—make billions of dollars at the expense of the human and peoples' rights of deltans. Oil pollution has poisoned all known rivers, while acid rain from wasteful gas flares destroys flora and fauna. The impunity of these TNCs is enhanced by the tacit

²⁶ See Human Rights Watch *The Curse of Gold: Democratic Republic of Congo* (2 June 2005) available at <http://hrw.org/reports/2005/drc0505/drc0505.pdf>.

²⁷ Above.

²⁸ The Niger Delta is approximately the size of England and comprises nine oil-rich states in Nigeria's federal structure: Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo, and Rivers.

consent of a host state that is more concerned with profits from fossil fuels than the protection of its citizens' rights.²⁹

On many occasions, TNCs disobey domestic court orders either in respect of injunctive relief or in the award of compensation, especially where such orders also conflict with state interests. Court judgments in the Niger Delta are used as mere “source[s] of factual evidence of the impact of oil operations”.³⁰ In *Chief Joel Anaro v Shell Petroleum Development Company Nigeria*,³¹ a Nigerian court found Shell liable for negligence and breach of statutory duties—for oil spills that affected fish-ponds, fish channels, mangrove swamps, farm lands, riverines, and lakes and streams belonging to local communities. The Court held that the plaintiffs were entitled to damages and compensation for loss of income from fishing rights, domestic animals, destruction of fishing grounds and materials, and awarded them 30.5 million naira (about 250,000 USD). Backed by the military government, the defendant refused to pay, leaving the aggrieved without any further legal redress.³²

Both in Nigeria and DR Congo, TNCs routinely put their aircrafts at the disposal of government forces to use in fighting perceived dissidents and insurgents. Evidence at two

²⁹ See, in general, Human Rights Watch *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (1999) (chronicling the adverse activities of these oil multinationals and how they suppress opposition with the cooperation of the government). Cf Amnesty International *Ten years on: Injustice and Violence Haunt the Oil Delta* AI Index: AFR 44/022/2005 3 Nov 2005 (“Ten years after the executions of writer and human rights campaigner Ken Saro-Wiwa and eight other members of the Ogoni ethnic community horrified the world, the exploitation of oil in the Niger Delta continues to result in deprivation, injustice and violence.”).

³⁰ JG Frynas *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (2000) 7 (a socio-legal text that combines the analysis of concrete institutional arrangements with an investigation of personal experiences and perceptions of the legal system).

³¹ See *Chief Joel Anaro v Shell Petroleum Development Company Nigeria* Suit Nos W/72/82 W/16/83 W/17/83 & W/20/85 RCD/36/89 (unreported).

³² See ‘Law Report’ *Living* Apr – June 1998 20–21.

lawsuits in the US³³—one in California state court and another in a federal court—alleged that Chevron paid some Nigerian soldiers for services on 4 January 1999, the day several villagers in the Niger Delta were allegedly killed and homes set on fire.³⁴ The evidence further revealed that the soldiers used Chevron-owned and -operated sea trucks and helicopters in Opia and Ikenyan later that day and on the Parabe oil drilling platform a half year earlier.³⁵

In 2006, a military judge in DR Congo ruled that three former employees of a Canadian mining company (Anvil)³⁶ should face prosecution for complicity in war crimes.³⁷ In 2005, Anvil confirmed that it loaned a plane and vehicles to the army, but said it “had absolutely no choice” than to accede to a government request for logistical support. “When the army arrives with AK-47s ... you give them what they want”, said Anvil spokesperson.³⁸ He added that companies are obliged by law to comply with Congolese government requests, but the Congolese military prosecutor asked that the three be formally charged, having found that the Anvil employees “voluntarily failed to

³³ A human rights NGO—Earth Rights International (ERI)—and other lawyers brought the lawsuits against Chevron on behalf of Nigerian residents.

³⁴ See W Baue ‘New Document Alleges Tie Between Chevron and Human Rights Abuses in Nigeria’ *Social Funds* 12 Aug 2005 available at <http://www.socialfunds.com/news/article.cgi/1778.html>.

³⁵ Above. See also D Baker ‘Chevron Paid Nigerian Troops After Alleged Killings: Villagers in Lawsuit Say 4 People Died—Oil Company Questions if Attacks Took Place’ *San Francisco Chronicle* 4 Aug 2005 available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/08/04/MNGAJE2I2K1.DTL>.

³⁶ Anvil Mining Limited is incorporated in the Northwest Territories of Canada, with its business managed from its Perth office. Anvil Management NL (Australia) and Anvil Mining Holdings Limited (United Kingdom), has a 90 percent holding in Anvil Mining Congo SARL, which owns Dikulushi Mine. See Rights and Accountability in Development *Congolese Military Judge Calls for the Prosecution of Former Anvil Mining Staff for Complicity in War Crimes* 15 Oct 2006 available at http://raid-uk.org/docs/Press_Releases/Background_Brief_15_Oct_06.pdf.

³⁷ See K Patterson ‘African Tribunal Cites Canadian Company for Role in Massacre’ *CanWest News Service* (Ottawa) 17 Oct 2006 available at <http://www.canada.com/nationalpost/news/story.html?id=d7c6d1ea-3fb7-4a10-84df-9595122e8908&k=15342>.

³⁸ Above (quoting Robert LaValliere, who recalled that troops had commandeered vehicles at gunpoint in a previous clash with rebels earlier that year).

withdraw” the vehicles.³⁹ The case itself is getting drown in waters of powerful intrigues, as the prosecutor is coming under intense political pressure to drop it.⁴⁰

During Liberia’s long-drawn civil war, Charles Taylor, who was bent on becoming head of state, relied entirely on non-institutional channels to prosecute his mindless war against his people. A consortium of North American, European and Japanese mining, timber and rubber companies colluded with Taylor and paid him staggering and almost unbelievable sums to secure unimpeded access to the iron ore mining consortium on the Liberia-Guinea border.⁴¹ In 1991, Taylor agreed to cooperate with the manager of Firestone’s rubber plantation in rubber production and marketing and was, in return, paid US \$2 million annually.⁴² The British-owned African Mining Consortium Limited also paid to Taylor US \$10 million a month to ship stockpiled ore on an existing railroad.⁴³ Taylor, who currently stands trial before the Sierra Leone Special Court for his complicity in that country’s brutal civil war, provides insights into the calibre of men who rule and ruin Africa.

Oil revenue is aiding genocide in Darfur, Sudan. Several TNCs—Germany’s Siemens, France’s Alcatel, Switzerland’s ABB Ltd, Russia’s Tatneft, and PetroChina—

³⁹ Above.

⁴⁰ See Action Contre l’Impunité pour les Droits Humains Global Witness, Rights & Accountability in Development, *Military Prosecutor in Kilwa Trial Recalled to Kinshasa: Political Pressure Intensifies After Former Anvil Mining Staff and Congolese Military Charged with Commission of or Complicity in War Crimes* 26 Oct 2006 available at http://www.raid-uk.org/docs/Anvil_Dikulushi/Urgent_Appeal_ENG.pdf (condemning political interference in the Kilwa trial and appealing to President Joseph Kabila to demonstrate his determination to defend the rule of the law in the DR Congo).

⁴¹ W Reno ‘Reinvention of an African Patrimonial State: Charles Taylor’s Liberia’ (1995) 16(1) *Third World Quarterly* 115.

⁴² See P Atkinson *The War Economy in Liberia: A Political Analysis* (1997) 14.

⁴³ L Renda ‘Ending Civil Wars: The Case of Liberia’ (1999) 23 *Fletcher Forum of World Affairs* 59 66. Cf M Meredith *The State of Africa: A History of Fifty Years of Independence* (2006) 561 (“A British firm paid Taylor \$10 million a month for permission to ship out stockpiled iron ore through the deepwater port of Buchanan”).

have ignored pleas by human rights groups and handed money to the Khartoum serial killers in exchange for Sudan's oil.⁴⁴ The Chinese National Petroleum Corporation (CNPC) is one of the main oil concession-holders in Sudan, with the largest share—40 percent—in the Greater Nile Petroleum Operating Company (GNPOC). The Company has been investing in oil in Sudan since December 1996 and has exploited concessions in the Heglig and Unity oilfields and other productive fields. In July 2006, China started output from its concessions in the Melut basin, northern Upper Nile State in South Sudan, which will produce an estimated 200,820 barrels a day. China has invested over US\$3 billion in developing oil fields and building a 1,500 kilometres pipeline, refinery and port since 1998.⁴⁵ This greedy corporate interest explains why China has opposed every effort by the UN Security Council to take robust actions against Sudan for its atrocities in Darfur.⁴⁶

These oil rigs and mines create few jobs for Africans. When they do, the take-home pays hardly take workers home, not to mention other slave-like conditions of work. The Chinese-owned Collum Coal Mining Industries, based in southern Zambia, have reportedly sent many poorly-paid mine workers underground without protective clothing

⁴⁴ J Hari 'How the World's Biggest Corporations are Fueling Genocide in Sudan' *The Independent* [UK] 19 Nov 2004 (adding: "They simply have a morally neutral stance towards [the genocide].").

⁴⁵ See Amnesty International *Sudan/China: Appeal by Amnesty International to the Chinese Government on the Occasion of the China-Africa Summit for Development and Cooperation* AI Index AFR 54/072/2006 (Nov 2006).

⁴⁶ See T Deen 'Oil, Arms Stymie United Nations Effects on Sudan' *Inter Press Service* (Johannesburg) 5 Nov 2004 available at <http://www.ipsnews.net/interna.asp?idnews=26175>. Cf 'Never Too Late to Scramble' *The Economist* 26 Oct 2006 available at http://www.economist.com/world/africa/displaystory.cfm?story_id=8089719 ("It is clear, though, that China is not interested in pressing African governments to hold elections or be more democratic in other ways. That helps to explain why China directs so much money towards Sudan, whose odious regime can count on China's support when resisting any UN military intervention in Darfur ... The Chinese are supposed to be building an armaments factory as well"). See, in general, N Udombana 'Still Playing Dice with Lives: Darfur and Security Council Resolution 1706' (2007) 28(10) *Third World Quarterly* 97 (analysing the Realpolitik that continues to derail efforts to end the Darfur genocide).

or boots, necessitating its temporary closure by Zambian authorities in June 2006.⁴⁷ In April 2005, a massive and still unexplained blast levelled explosives factory on a premises owned by China's NPC Mining Africa. The blast killed forty-six persons.⁴⁸ In July 2006, six workers were shot and wounded at the Chinese-owned Chambishi mine in Zambia after rioting over wages.⁴⁹ In its search for economic space around the world, China shamelessly ignores human rights atrocities in Africa.

Many Chinese firms also refuse to hire and train locals for certain skills, preferring to bring in much of their own skilled labour. According to *The Economist*:

China brought in thousands of its own workers to build the 1,860km (1,160-mile) Tazara railway between Lusaka and the Tanzanian port of Dar es Salaam in the 1970s. It was finished ahead of schedule, but Tanzania and Zambia still have to rely on Chinese technical help to maintain it. African hopes of technology transfer may be over-optimistic.⁵⁰

The wage of an African worker in Chinese companies is low because wages in China are low, due to abundant cheap labour. The challenge is to get Chinese companies operating in Africa to moderate their harsh labour practices in their dealings with African workers. There is yet no evidence of any serious progress in this regard.

⁴⁷ See J Reed 'China's Africa Embrace Evokes Imperialist Memories' *Financial Times* 27 Sept 2006 available at https://registration.ft.com/registration/barrier?referer=http://www.business-humanrights.org/Categories/RegionsCountries/Africa/AfricaGeneral?&batch_start=11&location=http%3A//www.ft.com/cms/s/afb649d8-4e51-11db-bcbc-0000779e2340.html.

⁴⁸ Above.

⁴⁹ Above.

Perversely, Africa's governments and their corporate collaborators hardly release accurate details of revenues generated from natural resources.⁵¹ Their secrecy is their power—like the heir of Samson—, but such cultic secrecies engender massive corruption by making it difficult for citizens to verify the accuracy of revenue information disclosed, if at all. Corrupt leaders then launder the undisclosed revenues to Swiss banks and other Western institutions that aid and abet corruption; yet the West tirelessly advocate good, transparent, and accountable governance for Africa.⁵² (Hypocrisy is the only evil that walks invisible.) In Nigeria and other countries, presidents combine as oil ministers, which “further limit[s] public scrutiny of the country’s oil sector”.⁵³ Little wonder that, “over the past 40 years, about \$300 billion oil wealth has disappeared from [Nigeria]”,⁵⁴ making the wealth of nations to become the poverty of peoples. “The power of corrupt governments,” says Open Society Justice Initiative,⁵⁵

⁵⁰ ‘Never too late to scramble’ (note 46 above).

⁵¹ See eg Catholic Relief Services and the Bank Information Center *Chad’s Oil: Miracle or Mirage? Following the Money in Africa’s Newest Petro-State* Feb 2005 3 available at <http://advocacy.crs.org/oil> (reporting: “While some information on Chad’s oil revenues is made public, details regarding the calculation of revenues and many key agreements between the oil companies and the government remain secret”).

⁵² Cf Commission for Africa *Our Common Interest: Report of the Commission for Africa* (2005) 14 [hereinafter *Our Common Interest*] (urging foreign banks to repatriate money and state assets stolen from the people of Africa by corrupt leaders and “foreign companies involved in oil, minerals and other extractive industries [to] make their payments much more open to public scrutiny”).

⁵³ D Phillips ‘Nigeria on the Brink’ *The Guardian* [Nig] 1 Jan 2007 available at http://www.guardiannewsng.com/editorial_opinion/article03.

⁵⁴ See O Adeniyi ‘Wolfowitz: Nigeria Has Lost \$300 Billion to Corruption’ *This Day* [Nig] 17 Oct 2006 (quoting World Bank President).

⁵⁵ Open Society Justice Initiative *Legal Remedies for the Resource Curse: A Digest of Experience in Using Law to Combat Natural Resource Corruption* (2005) (reviewing some of the initiatives aimed at preventive transparency mechanisms against corporations, banks, and governments in natural resource-rich countries and exploring legal remedies as possible complements to these initiatives).

frequently derives from monopoly access to natural wealth and the support of private and governmental industry allies elsewhere in the world. Local populations suffer destruction of their immediate environment and official unaccountability, together with the social and economic devastation that follows: arbitrary eviction and dispossession, unlawful arrest or harassment, and neglect of healthcare, housing, and education.⁵⁶

Some TNCs use blackmail to cow African states from effectively regulating public health sectors. In 1997, South Africa enacted the Medicines and Related Substances Control Amendment Act to allow for compulsory licensing of pharmaceuticals. The aim was “to increase the availability of affordable medicines in South Africa,” through “generic substitution of off-patent medicines, transparent pricing for all medicines, and the parallel importation of patented medicines”.⁵⁷ Forty pharmaceutical companies, comprising some of the world’s largest, filed a lawsuit against the government, claiming, *inter alia*, that the Act violated the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS).⁵⁸ The fact is that Articles 31 and 2:1 of TRIPS, read in conjunction with Article 5.A.2 of the Paris Convention,⁵⁹ provide authority for the issuance of

⁵⁶ Above, 5.

⁵⁷ E t’Hoen ‘TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha’ (2002) 3 *Chicago Journal of International Law* 27 30.

⁵⁸ Agreement on Trade Related Aspects of Intellectual Property Rights 15 Apr 1994 WTO Agreement Annex 1C Legal Instruments-Results of the Uruguay Round (1994) 33 *International Legal Materials* 81. See S Boseley ‘At the Mercy of Drug Giants: Millions Struggle with Disease as Pharmaceutical Firms Go to Court to Protect Profits’ *Guardian* 12 Feb 2001 available at www.guardian.co.uk/Archive/Article/0,4273,4134799,00.html (reporting that approximately forty pharmaceutical companies were engaged in a legal challenge to sec 15(c) of South Africa’s 1997 Medicines Act).

⁵⁹ See FM Abbott ‘The TRIPS-Legality of Measures Taken to Address Public Health Crises: A Synopsis’ (2001) 7 *Widener Law Symposium Journal* 71 74 (arguing that the TRIPS Agreement “manifestly permits governments to authorize . . . compulsory licenses”).

compulsory licences. TRIPS also have implications on rights to food, development, and health,⁶⁰ making it imperative for governments to take necessary measures to safeguards human rights.

The suit was dropped in 2001 due to bad publicity,⁶¹ but it revealed the tension between free trade and the promotion of public health. It also “set a despicable precedent by which corporations, mostly incorporated in South Africa as subsidiaries of their parent companies, could sue a sovereign government claiming rights and benefits under TRIPS, an international treaty accepted or ratified exclusively by states as members of the WTO”.⁶² Yet, as Marks argues, “governments and activists around the world are supporting the right of South Africa and other countries faced with poverty and the devastating ravages of the AIDS epidemic to import or manufacture generic versions of the AIDS treatment drugs at a fraction of the price the pharmaceuticals charge”.⁶³

Surely, the obligation to respect, protect, promote, and fulfil human rights in Africa cannot be left only to increasingly weak states. The next segment interrogates the human rights obligations that have built, and are building, around non-state actors, with a view to establishing, *inter alia*, the customary law basis of such obligations.

⁶⁰ See eg ECOSOC ‘The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights Report of the High Commissioner’ E/CN4/Sub2/2001/13 (27 June 2001) para 2 (“[T]he TRIPS Agreement could affect the enjoyment of the right to health - in particular through its effect on access to pharmaceuticals”).

⁶¹ See K DeYoung ‘Makers of AIDS Drugs Drop S. Africa Suit’ *Washington Post* 19 Apr 2001 A13 (reporting that the world’s major pharmaceutical companies planned to drop their suit against the South African Government due to the “public relations nightmare”).

⁶² O Aginam ‘Between Life and Profit: Global Governance and the Trilogy of Human Rights, Public Health and Pharmaceutical Patents’ (2006) 31 *North Carolina Journal of International Law & Commercial Regulation* 901 911 (querying: “One wonders if, conversely, the South African government or any other developing country could sue a corporation claiming benefits for a breach of an international treaty obligation.”) As above.

⁶³ S Marks ‘Health and Human Rights: The Expanding International Agenda’ (2001) *American Society of International Law Proceedings* 64.

5.4 Interrogating the Norms on Horizontal Obligations of Non-state Actors

We begin our inquiry with the now celebrated case of *SERAC v Nigeria*,⁶⁴ where the complainant made series of allegations against the Nigerian Government in respect of the oil consortium between the Nigerian National Petroleum Company (NNPC) and Shell Petroleum Development Corporation (SPDC). Among the uncontested allegations before the African Commission was that the oil consortium exploited oil reserves in Ogoni community with no regard for the health and environment of the local communities. It released toxic wastes into the environment and local waterways and neglected and/or failed to maintain its facilities, thereby causing numerous spills in the proximate villages. The resulting contamination of water, soil and air has had serious short and long-term health impacts, including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems.⁶⁵

The communication further alleged that Nigeria condoned and facilitated these violations, by placing the legal and military powers of the State at the disposal of the oil companies.⁶⁶ It neither monitored operations of the oil companies nor required safety measures that are standard procedure within the industry. Rather, it withheld information from Ogoni communities on the dangers created by oil activities.⁶⁷ The government failed to mandate oil companies or its own agencies to produce health and environmental impact studies regarding hazardous operations and materials relating to oil production. It refused to permit scientists and environmental NGOs from entering Ogoni to undertake

⁶⁴ See *Social & Economic Rights Action Centre & Anor v Nigeria* Comm No 155/96 2001–2002 African Annual Activity Report Annex V [hereinafter *SERAC* case].

⁶⁵ Above, para 2.

⁶⁶ Above, para 3.

such studies. It ignored the communities' concerns on the impact of extractive activities, and responded to protests with massive violence and execution of Ogoni leaders.⁶⁸ The government failed to require oil companies to consult communities before beginning operations, even when such operations pose direct threats to community and individual lands.⁶⁹

Welcoming the opportunity to “make clear that there is no right in the African Charter that cannot be made effective” and that “international law and human rights must be responsive to African circumstances”,⁷⁰ the African Commission found that Nigeria had violated several articles of the Charter. It appealed—yes, not ordered, but *appealed*⁷¹—to the government to ensure protection of the environment, health and livelihood of the people of Ogoni; to ensure adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids; to undertake a comprehensive cleanup of lands and rivers damaged by oil operations; to ensure that appropriate environmental and social impact assessments are prepared for any future oil development; to guarantee safe operation of any further oil development through effective and independent oversight bodies for the petroleum

⁶⁷ Above, para 4.

⁶⁸ Above, para 5.

⁶⁹ Above, para 6.

⁷⁰ Above, para 68.

⁷¹ The African Charter vests the Commission with extremely limited powers. The Commission can only make recommendations to the offending parties, after what generally seems like an investigation rather than a judicial proceeding. See African Charter on Human and Peoples' Rights adopted 27 June 1981 entry into force 21 Oct 1986 Doc OAU/CAB/LEG/67/3/Rev5 (1982) 21 *International Legal Materials* 59 [hereinafter African Charter or Charter] art 58(2). The Commission cannot condemn an offending state and cannot award damages, restitution or reparations. And “[w]ith the sovereignty of the Assembly of Heads of State and Government and the Charter’s non-provision of alternative methods of compensation for victims of Human Rights violations, the said victims find themselves without any remedy”. African Commission, Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach 24th Ord Sess OAU Doc./OS/50b (XXIV) para 6 (1998).

industry; and to provide information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

The African Commission, however, made no consequential orders against SPDC, not being a party to the African Charter and, hence, not being joined as a respondent. The Commission limited itself to the vertical obligations of states to prevent and punish corporate human rights abuses especially where failure to do so violate treaty obligations.

The crux of the matter is whether TNCs, as non-state entities, should directly account for such egregious violations of human and peoples' rights, given their capacity and propensity "to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities?"⁷² This Article argues that these global monsters should have direct, horizontal obligations to the peoples and communities within their sphere of operations. Increasing power and influence must entail increasing responsibility. Vesting TNCs with horizontal human rights obligations is a corollary of a State's vertical and diagonal obligations to respect, protect, promote, and fulfil human rights.

The above proposition, however, leaves unanswered the question of how to identify standards applicable to TNCs; or, to use Ratner's formulations,

⁷² Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights E/CN4/Sub2/2003/12 (2003) [hereinafter Draft Norms for TNCs] pmb.

can decision makers transpose the primary rules of international human rights law and the secondary rules of state and individual responsibility onto corporations? If corporations are such significant actors in international relations and law, then can they not assume the obligations currently placed on states or individuals, based on those sets of responsibility?⁷³

The first segment interrogates the developed and developing international law on responsibility of non-state entities generally, while the second addresses the specific norms crystallizing around TNCs for human rights.

5.4.1 The Legal Basis for Accountability of Non-state Actors

In 1999, Kofi Annan called on corporate leaders to “a) support and respect the protection of international human rights within their sphere of influence; and b) make sure their own corporations are not complicit in human rights abuses.”⁷⁴ For Amnesty International, “multinational companies have a responsibility. ... Companies and financial institutions are organs of society [within the meaning of the UDHR]. ... All companies have a direct responsibility to respect human rights in their own operations”.⁷⁵ *The Economist* sums up the new paradigm thus:

Today multinationals are under pressure as never before to justify their dealings with abusive regimes and their treatment of employees in developing countries. Firms

⁷³ Ratner ‘Corporations and Human Rights’ (note 10 above) 492.

⁷⁴ K Annan *A Compact for the New Century* (31 Jan 1999) available at www.un.org/partners/business/davos.htm.

used to brush off criticism, saying that they had no control over third-world suppliers, and that politics was none of their business anyway. This is no longer good enough.⁷⁶

The practice of the UN Security Council also supports this shift in international legal paradigm. The Council, which bears primary responsibility for the maintenance of international peace and security,⁷⁷ has invoked Chapter VII of the UN Charter to impose sanctions on non-state entities. It has also addressed resolutions to non-member states of the UN, acting on Article 2(6) of the Charter.⁷⁸ One of the earliest resolutions targeted at non-state entities were Resolutions 232 of 1955 and 253 of 1968⁷⁹ dealing with the rebellion in the then Southern Rhodesia (now Zimbabwe). Resolution 253, in particular, urged states and non-states members of the UN—“having regard to the principles stated in Article 2 of the [UN] Charter”⁸⁰—to “prevent airline companies constituted in their territories and aircrafts of their registration or under charter to their nationals from operating to or from Southern Rhodesia and from linking up with any airline company

⁷⁵ Amnesty International *Human Rights Principles for Companies* ACT 70/01/98 (1998).

⁷⁶ ‘Survey: Human-Rights Law; the Power of Publicity’ *The Economist* 5 Dec 1998 13.

⁷⁷ See UN Charter, art 24 (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”).

⁷⁸ Above, art 2(6) (“The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”).

⁷⁹ See Security Council Resolutions 232 of 15 Dec 1966 and 253 of 25 May 1968.

⁸⁰ Resolution 253 (note 79 above) para 14.

constituted or aircraft registered in Southern Rhodesia”.⁸¹ Since then, targeted sanctions against non-state entities have recurred in various Security Council resolutions.⁸²

The development of human rights in the last century deflated the balloon of subjecthood and vested individuals with rights and obligations at the international level;⁸³ and “individuals are the real subjects of international duties not only when they act on behalf of the State ... [but also] in all cases in which international law regulates directly the conduct of individuals as such”.⁸⁴ In the *LaGrand case*, the ICJ referred to the Vienna Convention on Consular Relations of 1963 and concluded that “article 36, paragraph 1, creates individual rights”.⁸⁵ In *Onwo v Oko*,⁸⁶ the Nigerian Court of Appeal extended the protection of individuals within the State against the excesses of fellow citizens, insisting that where individuals invade others’ fundamental rights, the victims have rights against violators, as they would have done against the State.

Several instruments support this proposition, including the African Charter, which articulates autonomous duties of individuals to other natural and legal persons, specifically the “family and society, the State other legally recognized communities and the international community”.⁸⁷ The Charter urges individuals, *inter alia*, to “preserve the harmonious development of the family and to work for the cohesion and respect of the

⁸¹ Above, para 6.

⁸² See eg Security Council Resolution 1591 UN SCOR 5153d mtg para 3(c) UN Doc S/Res/1591 (2005) (imposing “smart sanctions” on all persons found to “impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities,...”).

⁸³ On the position of individuals vis-à-vis international human rights law, see eg A Cassesse *Human Rights in a Changing World* (1990); H Lauterpacht *International Law and Human Rights* (1950).

⁸⁴ H Lauterpacht ‘General Rules of the Law of Peace’ in E Lauterpacht (ed) *Collected Papers* vol 1 (1970) 284.

⁸⁵ See *LaGrand case* (2001) ICJ Reports para 77.

⁸⁶ *Onwo v Oko* (1996) 6 NWLR (Pt 456) 584.

family; to respect his parents at all times, *to maintain them in case of need*".⁸⁸ By this and other provisions, individuals become duty-bearers in promoting and securing human rights up to the limits of their abilities.⁸⁹ The UDHR provides that

every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.⁹⁰

"Every individual and every organ of society" excludes no one, no market, no corporation, and no cyberspace.⁹¹ While many of the UDHR's provisions constitute binding custom, it is arguable if this bindingness extends to its preambles. However, the UDHR also provides that 'everyone' has duties to the community,⁹² and 'everyone' means *everyone*. All of this indicates that the notion of horizontal human rights

⁸⁷ See African Charter (note 71 above) art 27.

⁸⁸ Above, art 29(1) (emphasis supplied). The individual is further obliged "[t]o serve his national community by placing his physical and intellectual abilities at its service;" and [t]o work to the best of his abilities and competence, and to pay taxes imposed by the law in the interest of the society". Above, art 29(2)&(6).

⁸⁹ Cf F Spagnoli 'The Horizontal Priority of Economic Rights' in N Udombana & V Besirevic (eds) *Re-thinking Socio-economic Rights in an Insecure World* (2006) 21-26 ("Whereas forbearance is an equal obligation for all, states and individuals, active involvement is an obligation which comes in degrees. Our individual and active duties arising from economic rights are not the same towards everyone.").

⁹⁰ Universal Declaration of Human Rights adopted 10 Dec 1948 GA Res 217 A (III) GAOR 3d Sess [hereinafter UDHR] pmb1.

⁹¹ See L Henkin 'The Universal Declaration at 50 and the Challenge of Global Markets' (1999) 25(1) *Brooklyn Journal of International Law* 25.

obligations had been gestating for quite sometime, certainly before the NWO. As “organs of society”, TNCs have a responsibility to observe human rights in their operations.⁹³

There is also a shift at the instrumental level from immunity to accountability, with individuals now personally responsible for international crimes such as genocide, war crimes and crimes against humanity. As the Nuremberg Tribunal in the *Trial of Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany*, “[c]rimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.⁹⁴ The Nuremberg experiment was the precursor to subsequent international criminal tribunals, including the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR). The entry into force of the Rome Statute of the International Criminal Court (ICC)⁹⁵ in 2002 now paves way for a permanent forum to hold individuals directly accountable for international crimes—genocide, war crimes, and crimes against humanity—when national justice systems are either unwilling or unable to act.

⁹² UDHR (note 90 above) art 29.

⁹³ Cf A Clapham & S Jerbi ‘Categories of Corporate Complicity in Human Rights Abuses’ (2001) 24 *Hastings International & Comparative Law Review* 339 340 (arguing, “companies may not be in the habit of referring to themselves as ‘organs of society,’ they are a fundamental part of society. As such, they have a moral and social obligation to respect the universal rights enshrined in the Declaration”); Amnesty International *Human Rights Principles for Companies* ACT 70/01/98 (1998) (maintaining that “multinational companies have a responsibility. ... Companies and financial institutions are organs of society [within the meaning of the UDHR]. ... All companies have a direct responsibility to respect human rights in their own operations”).

⁹⁴ The *Trial of Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg Germany* (1950) Pt 22 447. See also (1947) *American Journal of International Law* 172 188. Cf Statute of the International Criminal Tribunal for the Former Yugoslavia UN Doc S/Res/827 (1993); Statute of the International Tribunal for Rwanda SC Res 955 49 UN SCOR (3452nd meeting) UN Doc S/Res/955 (1994); and the requirements of the Rome Statute of the International Criminal Court 37 *International Legal Materials* 999 opened for signature 17 July 1998.

⁹⁵ See Rome Statute of the International Criminal Court UN Doc A/CONF183/9 (17 July 1998).

In *Prosecutor v Tadic* Case,⁹⁶ the Appeals Chambers of the ICTY upheld the legality of prosecuting non-state entities for violations of the laws and customs of war, including violations of Common Article 3 and the Additional Protocols.⁹⁷ Similarly, in *Prosecutor v Akayesu*,⁹⁸ the ICTR held that a breach of fundamental guarantees of international humanitarian law (IHL) was a “serious violation” entailing individual criminal responsibility.⁹⁹ This responsibility extends to those who aids and abets, that is, those who knowingly provide practical assistance, encouragement or moral support having a substantial effect on the commission of crime.¹⁰⁰ Rebel leaders, in particular, are responsible for the conduct of their members and may be “held so responsible by opposing parties or by the outside world”.¹⁰¹

Private actors are being held liable in the US for torturous human rights violations, using the Alien Tort Claims Act (ATCA).¹⁰² In *Kadic v Karadzic*,¹⁰³ the US Court of Appeals for the Second Circuit rightly held that “the law of nations as understood in the modern era does not confine its reach to state action. Instead, certain forms of conduct violate the law of nations whether undertaken by those acting under auspices of state or

⁹⁶ *Prosecutor v Tadic* Case No IT-94-1-T Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (2 Oct 1995).

⁹⁷ Above, paras 86-93.

⁹⁸ *Prosecutor v Akayesu* Case No ICTR-96-4-T Judgment (2 Sept 1998).

⁹⁹ Above, paras 616-17. Cf Committee on the Rights of the Child *Concluding Observations of the Committee on Rights of the Child: Uganda* CRC/C/15/Add80 para 34 21 Oct 1997 (“Violations of the rules of [IHL] entail responsibility being attributed to the perpetrators.”).

¹⁰⁰ See *Prosecutor v Furundžija* Case No IT-95-17/1 Judgment (10 Dec 1998).

¹⁰¹ F Kalshoven & L Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (3rd ed 2001) 75.

¹⁰² See Alien Tort Claims Act (ATCA) 28 USC sec1350.

¹⁰³ See eg *Kadic v Karadzic* 70 F3d 232 (2d Cir 1995) (involving a suit by victims from Bosnia-Herzegovina against a self-designated president of an unrecognized Bosnian-Serb entity).

only as private individuals”.¹⁰⁴ The Court stated that “atrocities are actionable under the Alien Tort Act (ATCA), without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes”.¹⁰⁵ “A private individual acts under color of law ... when he acts together with state officials or with significant state aid”.¹⁰⁶ In *Iwanowa v Ford Motor Co*,¹⁰⁷ which alleged Ford’s use of slave labour and the impact of that labour on the company’s profitability, the Court held: “No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law”.¹⁰⁸ More on ATCA, shortly.

There is, thus, no sound reason to leave out non-state actors in the framework of human rights obligations. Human rights are part of the state, part of the *raison d’être* of the state, but they are more than just protective tools against a state’s predatory powers. They also regulate, or ought to regulate, relationships between non-state actors,¹⁰⁹ but as the South African case against pharmaceutical companies illustrates, states are often unable to regulate the human rights behaviour of non-state actors due to imperatives of globalisation. The power imbalances that the new international order create make it increasingly difficult for weaker states to assert full control over policies that are central

¹⁰⁴ Above, 239.

¹⁰⁵ Above, 244.

¹⁰⁶ Above, 245.

¹⁰⁷ *Iwanowa v Ford Motor Co* 67 F Supp 2d 424 (DNJ 1999).

¹⁰⁸ Above, 445.

¹⁰⁹ See F Spagnoli *Homo Democraticus: On the Universal Desirability and the Not So Universal Possibility of Democracy and Human Rights* (2003) 90.

to their ability to fulfil their socio-economic rights obligations.¹¹⁰ While human rights norms stress participation, non-discrimination, empowerment and accountability, globalisation norms stress free trade, growth, employment and sustainable development. Sometimes, these two sets of objectives are in opposition, making it difficult to establish a social and international order conducive to the enjoyment of all human rights.¹¹¹

The coercive use of conditionality by IFIs in shaping economic and social policies of debtor, mostly developing, nations represents a shift in governing power and a contraction of the political and economic independence of states.¹¹² There is clearly a need for protection against the governing power, which should be available against every entity or sector where that governing power is in fact located.¹¹³ The international and domestic responsibilities of TNCs and these other actors should be engaged “insofar as their activities infringe upon the human dignity of those with whom they have special ties”.¹¹⁴ They should also be engaged “insofar as they cooperate with those actors whom international law already sees as the prime sources of abuses—state—[of a human rights]”.¹¹⁵

The ICESCR enjoins international cooperation for the realization of its rights,¹¹⁶ likewise the UDHR, which provides that everyone is “entitled to realization, through

¹¹⁰ See S Narula ‘The Right to Food: Holding Global Actors Accountable under International Law’ (2006) 44 *Columbia Journal of Transnational Law* 691 693-4.

¹¹¹ See Globalization and its impact on the full enjoyment of all human rights: Preliminary Report of the Secretary-General A/55/342 (31 Aug 2000) para 8.

¹¹² See Wahi (note 10 above) 382.

¹¹³ See AS Miller ‘The Constitutional Law of the Security State’ (1958) 10 *Stanford Law Review* 620 634-42.

¹¹⁴ Ratner ‘Corporations and Human Rights’ (note 10 above) 449.

¹¹⁵ Above.

national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.¹¹⁷ All of this implicates states and non-state entities. Certain provisions in the ICESCR, including articles 11, 15, 22 and 23, further underline the essential role of international cooperation in facilitating the full realization of socio-economic rights. Article 23 specifically identifies “the furnishing of technical assistance” and other activities as being among the means of “international action for the achievement of the rights recognized”.¹¹⁸

The ICESCR Committee emphasises that “it is particularly incumbent on States parties and other actors in a position to assist, to provide ‘international assistance and cooperation, especially economic and technical’ which enable developing countries to fulfil their core and other obligations”.¹¹⁹ In relation to the right to adequate food, the Committee made this important comment:

¹¹⁶ See International Covenant on Economic, Social and Cultural Rights adopted 16 Dec 1966 entry into force 23 Mar 1976 993 UNTS 3 [hereinafter ICESCR] art 2.

¹¹⁷ UDHR (note 90 above) art 22. Cf Millennium Development Goals 2000 para I–2 *available at* <http://www.un.org/millenniumgoals/> [hereinafter MDG] (“We recognize that, in addition to our separate responsibilities to our individual societies, we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world’s people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs”).

¹¹⁸ Cf CESCR General Comment 3 ‘The Nature of State Parties’ Obligations (art 2(1) para 1 of the Covenant)’ (5th session 1990) UN Doc E/1991/23 Annex III para 14; Declaration on the Right to Development 4 Dec 1986 GA Res. 41/128 (1986) [hereinafter DRD] art 4(2) (noting, *inter alia*, that sustained action is required to promote development in developing countries and called on states to co-operate for this purpose). On the nature of third state obligations under the ICESCR, see M Sepulveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003); R Kunneemann ‘Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights’ in F Coomans & MT Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (2004) 201; S Skogly ‘The Obligation of International Assistance and Cooperation in the International Covenant on Economic, Social and Cultural Rights’ in M Bergsmo (ed) *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjørn Eide* (2003) 403; P Alston & G Quinn ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ 9 *Human Rights Quarterly* (1987) 186.

¹¹⁹ See CESCR ‘The Right to Water (arts 11 and 12 of the Covenant)’ General Comment 15 UN Doc E/C12/2002/11 para 3 26 Nov 2002 [hereinafter General Comment 15] para 38. Cf CESCR ‘The right to the highest attainable standard of health (article 12 of the ICESCR)’ General Comment 14 E/C12/2000/4 [hereinafter General Comment 14] para 45 (endnote omitted). The CESCR has also stated that IFIs “should pay greater attention to the protection of the right to

While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society—individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector—have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private business sector—national and transnational—should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.¹²⁰

Human rights are universal because they articulate truly essential values and “stem from the attributes of human beings which justifies [sic] their national and international protection”.¹²¹ Of course, the concrete rights differ widely in their nature and operation. Many of these rights have *erga omnes* obligations when they become *jus cogens* either through treaty or customary law. Some commentators consider the preemptory character of socio-economic rights as problematic, as they entail affirmative duties requiring the availability of resources to give effect to them.¹²² Nevertheless, to the extent that the

health in their lending policies, credit agreements and structural adjustment programmes”. Above, para 39. Cf CESCR ‘The right to adequate housing (Art 11 (1))’ General Comment 4 [hereinafter General Comment 4] para 19 (“International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing”).

¹²⁰ CESCR ‘The Right to Adequate Food’ General Comment 12 (1999) [hereinafter General Comment 12] para 20.

¹²¹ African Charter (note 71 above) pmb1.

¹²² See eg T Meron ‘On a Hierarchy of International Human Rights’ (1986) 80 *American Journal of International Law* 111 (noting that the *jus cogens* status of some socio-economic rights is problematic because they “involve clusters of rights whose components require scrutiny”).

rights apply universally, they apply without exception to non-state actors, on the principle of equality before the law, itself a general principle of law recognized by all civilized nations.

5.4.2 The Crystallising Norms on Corporate Human Rights Behaviour

Several initiatives have been undertaken in the recent past to control corporate behaviour. Some of these initiatives come by way of voluntary codes of conduct popularly called corporate social responsibilities (CRS) or corporate citizenship (as it is sometimes called). Others are externally imposed, but all conglomerate into a general duty by TNCs to protect persons within their sphere of influence from threats to their rights, even for indirect threats that are in some way connected to companies. This segment interrogates some of these initiatives and the crystallising norms.

1. Corporate Social Responsibility

The inadequacy of governmental actions in dealing with human rights issues, coupled with the increasing role of TNCs for human rights violations, led organised civil society to call for CSR policies. Triggered by civil society pressures and by their internal assessment of human rights-related risks and opportunities in their operating social and political environments, many TNCs have developed and some have attempted to implement a portfolio of activities to reduce, if not eliminate, negative side-effects and advance positive effects of their operations. They also generally recognise certain

universal human rights, although “[t]he levels of support vary according to the type of right, with labor rights ranking highest”.¹²³

CSR “represents a company’s commitment to explore and seize opportunities to enhance its overall contribution to society and sustainability while pursuing its core objective, which is value maximization”.¹²⁴ Its premise is that “corporations, because they are the dominant institution of the planet, must squarely face and address the social and environmental problems that afflict humankind”.¹²⁵ Is CSR the be-all and end-all response to human rights violations by TNCs? It is not, because such voluntary initiatives necessarily rely on ‘internal’ frames of reference and reflect what is politically acceptable within and among the participating entities, rather than what is objectively required by the human rights needs on the ground. They lack international legitimacy as they do not provide adequate accountability mechanisms.

Self-regulation without an external frame of reference “cannot be relied on as the primary means for ensuring respect of basic human rights by TNCs.”¹²⁶ In effect, CRS is not about human rights, but about corporations avoiding regulations, covering up the damage caused to communities and the environment, and maintaining public co-operation with the corporate-dominated systems. Voluntary codes have become

¹²³ M Wright & A Lehr *Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations* ix (Dec 2006) available at <http://www.reports-and-materials.org/Business-Recognition-of-Human-Rights-12-Dec-2006.pdf> (reporting on the human rights standards referenced or invoked by a cross-section of companies, collective initiatives, and socially responsible investment funds).

¹²⁴ F Amalric *et al* ‘Transnational Corporations and Human Rights: The Business Implications’ *CCRS Working Paper Series* No 03/05 (2005) 3 n 5 available at <http://www.humanrights.ch/cms/upload/pdf/050504transnationalcorps.pdf>.

¹²⁵ E Westfield ‘Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century’ (2002) 42 *Vanderbilt Journal of International Law* 1075 1082 (citing P Hawken & W McDonough *Seven Steps to Doing Good Business* Inc Nov 1993 80). See, in general, CA Williams ‘Corporate Social Responsibility in an Era of Economic Globalization’ (2002) 35 *University of California Davis Law Review* 705.

¹²⁶ D Kinley & R Chambers ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ (2006) *Human Rights Law Review* 447 492.

fashionable strategies for bolstering a company's public image; avoiding regulation; gaining legitimacy and access to markets and decision makers; and shifting the ground towards privatization of public functions.¹²⁷ Thus, CRS enables business to propose ineffective, voluntary, market-based solutions to social and environmental crises under guise of being responsible, thereby deflecting blame for problems caused by corporate operations and protecting companies' interests. Such an insincere strategy hampers efforts to tackle the root causes of social and environmental injustice.¹²⁸

CSR should be seen as a beginning, not an end, in the search for practical rules to regulate corporate human rights behaviour. All stakeholders must constantly consider sustainable alternatives. One alternative should be to develop an understanding of home and host country responsibilities for negative impacts of foreign direct investment. Another is to move beyond the current "regulatory versus voluntary" policy divide to developing a balance between parent company accountability and intergovernmental co-operation for access to justice in developing states. Still another option should be to encourage inter-governmental initiative on information sharing or notification where TNCs that have been the subject of censure at home establish operations abroad.¹²⁹ Stakeholders should also examine laws allowing challenges to corporate restructurings, whether they are adequate to deal with possible future personal injury or environmental

¹²⁷ See C Fauset 'Preface' *What's Wrong with Corporate Social Responsibility? Corporate Watch Report 2006* (2006).

¹²⁸ Above. Cf Sub-Commission on Human Rights 'Statement on Item 4c: Realization of Economic, Social and Cultural Rights and Question of Transnational Corporations' UN.Doc.ECN.4/Sub.2/2000/NGO/17 (2000) para IV ("Experience has shown that the efficacy of voluntary codes of conduct is very limited and sometimes temporary and that in most cases the corporations adopt them basically for image reasons ("greenwash"), which may even help them to win new markets.").

¹²⁹ See H Ward 'Transnational Corporate Accountability: Insights from South Africa' *Id21 Research Highlight 2* Oct 2002 available at <http://www.id21.org/society/insights43art5.html>.

claims. They should also establish clear understanding on when parent companies can be held accountable for negative impacts in developing countries.¹³⁰

The AU must play an active role in corporate governance, given that corporate human rights abuses are parts of challenges currently confronting Africa as a whole.¹³¹ It should urge TNCs operating in Africa to register their voluntary codes of conduct and similar initiatives with the AU Commission in Ethiopia. The Commission, in turn, should verify such initiatives against minimum applicable universal standards—including ILO Core Labour Standards—and monitor performance. The Pan-African Parliament (PAP)¹³² should similarly empanel a Committee to undertake annual hearings on TNCs' activities. It should particularly urge these corporations to publish audits of their operations in Africa and make them available to all stakeholders. The AU should urge TNCs to establish Investment Fund in the countries of operations, where a specific percentage of gross revenues should be channelled to local NGOs working on health, education, micro-credit, and infrastructure development.

2. *Inter-governmental Initiatives*

¹³⁰ Above.

¹³¹ Cf Constitutive Act of the African Union (AU) adopted 11 July 2000 entry into force 26 May 2001 CAB/LEG/23 15 (as amended by the Protocol on Amendments to the Constitutive Act of the African Union 11 July 11 2003) [hereinafter AU Act] pmb1 (wherein Member States pledge “to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world”).

¹³² The Pan-African Parliament (PAP) is one of the principal organs of the AU. See AU Act (note 131 above) art 5. Its establishment “is informed by a vision to provide a common platform for African peoples and their grass-roots organizations to be more involved in discussions and decision-making on the problems and challenges facing the Continent”. OAU Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament OAU Doc EAHG/3 (V) (2001) pmb1. The PAP is mandated, *inter alia*, “to (1) facilitate the effective implementation of the policies and objectives of the OAU/AEC and, ultimately, of the African Union; (2) promote the principles of human rights and democracy in Africa; [and] (3) encourage good governance, transparency and accountability in Member States”. Above, art 3(1–3). It presently has a mere “consultative and advisory powers”, but its “ultimate aim” is “to evolve into an institution with full legislative powers, whose members are elected by universal adult suffrage”. Above, art 2(3).

The absence of a binding ‘external’ constraint on corporate behaviour is not for want of attempt. Some governments and other agencies have embarked on initiatives to encourage companies to address human rights. In 2000 the US and UK met with some non-state actors, principally companies in the extractive and energy sectors and certain NGOs, to discuss means for companies in those sectors to protect and promote human rights. (Norway and Netherland have joined, with more than sixteen companies now participating in the process.) At the end of the meeting, the participants announced the Voluntary Principles on Security and Human Rights to guide such companies in ensuring respect for human rights while maintaining the safety and security of corporate operations.¹³³ These Principles partly reveal the nature of obligations of these corporations:

Companies should use their influence to promote the following principles with public security: (a) individuals credibly implicated in human rights abuses should not provide security services for Companies; (b) force should be used only when strictly necessary and to the extent proportional to the threat; and (c) the rights of individuals should not be violated while exercising the right to exercise freedom of association and peaceful assembly, the right to engage in collective bargaining, or other related rights of Company employees as recognized by the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.¹³⁴

¹³³ See US State Department *Fact Sheet on Voluntary Principles on Security and Human Rights* (20 Dec 2000) available at http://www.state.gov/www/global/human_rights/001220_fsdr1_principles.html [hereinafter *Voluntary Principles Fact Sheet*].

The role of TNCs in conflict-diamonds—diamonds sold to fund armed conflicts and civil wars¹³⁵—sensitized the world to the concept of blood diamonds. In December 2000, the UN General Assembly adopted Resolution 55/56,¹³⁶ “express[ing] the need to give urgent and careful consideration to devising effective and pragmatic measures to address the problem of conflict diamonds”.¹³⁷ Blood diamonds led to the regulation of the trade through the Kimberley Process Certification Scheme (KPCS), a 2003 government-launched voluntary system that imposes requirements on participants to certify that diamonds are conflict-free. Its elements, to use the language of Resolution 55/56, include the creation and implementation of a simple and workable international certification scheme for rough diamonds, based primarily on national certification schemes. It requires national practices to meet internationally agreed minimum standards, which should aim at securing the widest possible participation.¹³⁸ Others elements are the need for diamond processing, exporting and importing States to act in concert; the need for appropriate arrangements to help to ensure compliance, acting with respect for the sovereignty of States; and the need for transparency.¹³⁹

The KPCS is effective in clear-cut civil conflicts between a government and a rebel movement, but it has proved grossly inadequate to check corporate misbehaviour, such as

¹³⁴ Above.

¹³⁵ Diamonds have ignited and fuelled conflicts in such African countries as Angola, DR Congo, Liberia, and Sierra Leone. See eg P Billon ‘Angola’s Political Economy of War: The Role of Oil and Diamonds, 1975-2000’ (2001) 100 *African Affairs* 55 (examining how the spatial distribution of oil and diamonds in Angola guided and financed the military strategies of belligerents in the long-drawn Angolan conflict).

¹³⁶ See General Assembly Resolution 55/56 UN Doc A/Res/55/56 1 Dec 2000.

¹³⁷ Above), para 3.

¹³⁸ Above.

¹³⁹ Above.

in Angola's Lundas region, where diamond companies that certify diamonds and the security firms protecting them meet out harsh justice. Governance in Angola has been left to representatives of corporations that are driven by profit, rather than human rights, motives.¹⁴⁰ For the KPCS to succeed, all states must take tougher actions to prevent conflict diamonds from entering their territories. Some participating states have not shown sufficient vigilance to ensure the success of the Scheme. A recent report to US Congressional Committees indicates that conflict diamonds are entering the US because of major weaknesses in implementing the Clean Diamond Trade Act, which implements the KPCS.¹⁴¹ The highlighted weaknesses include lack of regular physical inspections of rough diamond imports and exports, poor statistics on rough diamonds and lack of plan for monitoring the Kimberley Process Authority (KPA). The report recommends improvement in accuracy of rough diamond statistics, periodic physical inspections of rough diamond imports and exports, and better oversight of the KPA.¹⁴²

The international community of states could also hold TNCs accountable on the basis of extraterritoriality principle, which allows jurisdiction for cases against companies registered or domiciled in home states in respect of damage sustained in third states.¹⁴³

¹⁴⁰ See Marques 'A New Diamond War' (note 23 above) A21.

¹⁴¹ See US Government Accountability Office (GAO) *Conflict Diamonds: Agency Actions Needed to Enhance Implementation of the Clean Diamond Trade Act* GAO-06-978 (Sept 2006) available at <http://www.gao.gov/new.items/d06978.pdf> [hereinafter GAO Report] (reporting that "because of weaknesses of the system, the United States cannot ensure that illicit rough diamonds are not traded"). Above, 38. See also Global Witness and Partnership Africa 'GAO Report Condemns Weak US Effort to Combat Conflict Diamonds *Press Releases* 28 Sept 2006 available at http://globalwitness.org/press_releases/display2.php?id=378 ("This [GAO] report shows that the US government has inadequately enforced the Clean Diamond Trade Act, undermining global efforts to keep conflict diamonds out of the legitimate diamond trade").

¹⁴² See GAO Report (note 141 above) 40-41.

¹⁴³ See eg European Parliament Resolution on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility COM(2001) 366 – C5-0161/2002 – 2002/2069(COS) 30 June 2002) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2002-0278+0+DOC+XML+V0//EN> (calling on Member States to incorporate the extraterritoriality principle in legislation).

The principle could allow home states to exercise due diligence in regulating their TNCs, especially “where it can be shown that the home state exercises decisive influence over the ability of TNCs to operate in an unregulated manner abroad”.¹⁴⁴ According to Narula:

Home state support for TNCs comes in a variety of forms: states negotiate bilateral and multilateral investment treaties that define the framework legal rights of TNCs; government export credit agencies offer overseas investment insurance to cover political risks, and in some cases commercial risks borne by TNCs; and regional and national development finance institutions offer private sector financing. Politically, home states have also played a role in the negotiation, rewriting, or enforcement of contracts that are heavily tilted in TNCs’ favor.¹⁴⁵

Hessbruegge also calls on home states to “take reasonable measures to prevent one of [their] transnational corporations from engaging in human rights infringing conduct in a developing state, if that state lacks the power, technical expertise or political will to fulfil its own diagonal obligations to protect”.¹⁴⁶ These measures are human rights imperatives rather than favours to host states, particularly as powerful states, in the majority of cases, provide their TNCs with significant financial and political backing that enables them to control resources and markets in developing countries.

3. Accountability through the Judicial Process

¹⁴⁴ Narula (note 110 above) 728.

¹⁴⁵ Above, 763 (footnotes omitted).

International and national judicial institutions are also increasingly prying into corporate activities for damage to the environment, health consequences to workers and communities; for infringement of the principle of preventive measures; and for financial offences, among others. US courts, in particular, are reversing their traditional reluctance to exercise jurisdiction over human rights violations committed against foreign persons abroad. The 1789 ATCA, as supplemented by the 1991 Torture Victim Protection Act (TVPA),¹⁴⁷ “offers the most attractive, and the most often used, opportunity for victims to obtain reparation orders”.¹⁴⁸ It allows foreign nationals to bring suits in US federal courts for torts committed in breach of international law or US treaties.¹⁴⁹ In the *Filartiga* case¹⁵⁰—regarded as “the *Brown v. Board of Education* of trans-national law litigation”¹⁵¹—the court found that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus whenever an alleged torturer is found

¹⁴⁶ See Hessbruegge (note 16 above) 83.

¹⁴⁷ See Torture Victim Prevention Act 28 USC sec1350 App.

¹⁴⁸ J Sarkin ‘Reparation for Past Wrongs: Using Domestic Courts around the World, Especially the United States, to Pursue African Human Rights Claims’ (2004) 32 *International Journal of Legal Information* 426 441. See, in general, J Lu ‘Jurisdiction over non-state activity under the Alien Tort Claims Act’ (1997) 35 *Columbia Journal of Transnational Law* 531.

¹⁴⁹ See eg *Abebe-Jira v Negewo* 72 F 3d 844 (11th Cir 1996) (alleging torture of Ethiopian prisoners); *In re Estate of Ferdinand Marcos* 25 F 3d 1467 (9th Cir 1994) (alleging torture and other abuses by former President of Philippines); *Tel-Oren v Libyan Arab Republic* 726 F 2d 774 (DC Cir 1984) (alleging claims against Libya based on armed attack upon civilian bus in Israel); and *Xuncax v Gramajo* 886 F Supp 162 (D Mass 1995) (alleging abuses by Guatemalan military forces).

¹⁵⁰ See *Filartiga v Pena-Irala* 630 F2d 876 (2n Cir 1980).

¹⁵¹ B Stephens ‘Translating *Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’ (2002) 27 *Yale Journal of International Law* 1 13.

and served with process within United States borders, the ATCA provides jurisdiction”.¹⁵²

Although ATCA contemplated three traditional torts—violations against safe conduct, infringement of the rights of ambassadors, and piracy,¹⁵³—the landscape is changing. Many lawsuits have been brought against TNCs under ATCA, some successfully, others not. *Doe v Unocal*¹⁵⁴ was the first case in which the Court held ATCA actions to apply to private corporations. The plaintiffs accused Unocal of knowingly using forced labour to construct its Yadana gas pipeline, which stretches through Burma into Thailand. Unocal contracted with the notorious military junta in Burma to provide security for the project. The junta forced local people to work to clear the way for the pipeline and its accompanying infrastructure. Soldiers used forceful tactics, such as murder and rape, to compel people to work. The Burmese villagers claimed that the California oil giant was liable for its complicity in the junta’s human rights violations.

Unocal provided opportunity for the Court of Appeals for the Ninth Circuit to give “the most explicit judicial definition of complicity” in relation to corporations. The ruling stipulated three criteria for determining complicity: giving practical assistance to the actual perpetrator of a crime; the assistance having a substantial effect on the commission of the criminal act; and the company knowing that its acts would result in a possible crime even if it did not intend the particular crime. These principles “conform closely to

¹⁵² *Filartiga* (note 150 above) 880.

¹⁵³ See R Chambers ‘The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses’ (2005) 13(1) *Human Rights Brief* 14 16.

¹⁵⁴ *Doe 1 v Unocal Corp* 963 F Supp 880 (CD Cal 1997).

what is widely thought to be the current state of international law on this subject”.¹⁵⁵ They, however, “have no legal status as precedents in relation to business”, as of now,¹⁵⁶ because the Court did not decide *Unocal* on its merit, but vacated it when parties reached a settlement on 13 December 2004. Nevertheless, the settlement included direct compensation and “substantial assistance” via funds for programs to improve living conditions, health care, and education of the Burmese villagers, thereby advancing the right to an adequate standard of living.

In *Eastman Kodak Co v Kavlin*,¹⁵⁷ the plaintiff was involved in a contractual dispute with a Bolivian company and claimed a conspiracy on the part of the firm and the Bolivian authorities to imprison him. The District Court observed that “it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power”. Other cases include *Wiwa v Royal Dutch Shell*,¹⁵⁸ for complicity in human rights abuses in Nigeria; and *Presbyterian Church of Sudan v Talisman Energy*,¹⁵⁹ for complicity of the Canadian company in genocide in Sudan.¹⁶⁰ *Khulumani et al v Barclays*¹⁶¹ was a setback in terms

¹⁵⁵ Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises E/CN.4/2006/97 para 9 22 Feb 2006 available at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement> [hereinafter Ruggie Interim Report] para 72.

¹⁵⁶ Above, para 72 n 25. Cf Chambers (note 153 above) 16 (arguing that, with the Unocal settlement, “it is unknown where the law now stands”).

¹⁵⁷ *Eastman Kodak Co v Kavlin* 978 F Supp 1078 (SD Fla 1997).

¹⁵⁸ *Wiwa v Royal Dutch Petroleum* 226 F 3d 88 (2d Cir 2000) (charging Shell with complicity in the 10 November 1995 hanging of Ken Saro-Wiwa and John Kpuinen, two of nine leaders of MOSOP, in the torture and detention of Owens Wiwa, and in the wounding of a woman, peacefully protesting the bulldozing of her crops in preparation for a Shell pipeline, who was shot by Nigerian troops called in by Shell). See also *Wiwa v Royal Dutch Petroleum* 392 F3d 812 (5th Cir 2004).

¹⁵⁹ *Presbyterian Church of Sudan v Talisman Energy* 374 F Supp 2d 331 (SDNY 2005).

¹⁶⁰ As set out in the most recent decision, the complainant’s allegations are that “Talisman and the Government worked together to devise a plan for the security of the oil fields”; that Talisman “hired its own military advisors to coordinate

of the invocation of ATCA for corporate human rights abuses. An NGO, representing 32,000 victims of the apartheid regime, instituted the suit against many TNCs (among them Barclay's and Citigroup banks and such mining companies as Rio Tinto) for their alleged role in supporting and profiting from South Africa's apartheid regime. The New York District Court held that ATCA does not provide for aiding and abetting theory of liability.

Sometimes, a bill of rights influences a court's interpretation and development of the common law in the equivalent situation. The jurisprudence of the South African Constitutional Court illustrates this proposition. *Du Plessis v De Klerk*¹⁶² was one of the early cases in South Africa where the issue of horizontal application of human rights to non-state actors came up for consideration. The owner of a private airline sued a newspaper for defamation in connection with a series of news stories asserting that the plaintiff had run guns to participants in the Angolan civil war. The newspaper argued that the Interim South African Constitution's protection of freedom of expression insulated it from liability. A sharply divided Constitutional Court denied the existence of direct horizontal effect under the Interim Constitution. Writing on behalf of the majority, Justice Kentridge concluded that a common law infringement of an entrenched right, insofar as it is the basis of some form of governmental action, is subject to direct constitutional challenge. However, the Bill of Rights did not apply directly to the common law when

military strategy with the Government"; and that there were regular "meetings involving Talisman, Army intelligence, and the Ministry of Energy and Mining where Talisman would map out areas intended for exploration and they would discuss how to dispose of civilians in those areas." *Presbyterian Church of Sudan v Talisman Energy* No 01 Civ9882 2005 WL 2082847 *2 (SDNY 30 Aug 2005). See also Chambers (note 153 above) 16.

¹⁶¹ *Khulumani et al v Barclays, in re South African Apartheid Litigation* 346 F Supp 2d 538 (SDNY 2004).

¹⁶² See *Du Plessis v De Klerk* 1996 SACLR LEXIS 1 (CC).

relied upon by a private party in a private dispute and where no act of government was relied upon to support the action.¹⁶³

Justice Kriegler (joined by Justice Didcott) dissented, interpreting section 35(3) of the Interim Constitution¹⁶⁴ to imply that values embodied in the Bill of Rights would permeate the common law in all aspects, including private litigation. He argued that the text of the Constitution revealed that its framers had proclaimed far more sweeping aims than the mere repression of state power and that the primacy of equality in the Constitution's structure compelled horizontality.¹⁶⁵ This dissenting opinion accords with earlier rulings by lower courts sanctifying horizontality. In *Mandela v Falati*,¹⁶⁶ the Witwatersrand Division of the Supreme Court addressed the issue of horizontal application on the question whether an injunction to bar the publication of allegedly defamatory material was permissible. The Court held that the Constitution's supremacy clause and section 7(2)—extending its application “to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution”—implicitly supported the direct horizontal application of the Bill of Rights.

In *Holomisa v Argus Newspapers Ltd*,¹⁶⁷ a military general brought a defamation case against a newspaper on the ground that its report contained false allegations accusing him

¹⁶³ Above, 80-85. The Court's conclusion was derived from sec 7 of the Interim Constitution, according to which the rights' guarantees would bind all legislative and executive organs of the state at all levels of government, thus implying that the judiciary, while applying the common law between private parties, was not bound by the Bill of Rights.

¹⁶⁴ See South African (Interim) Constitution 1993 sec 35(3) (providing, “[i]n the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter”).

¹⁶⁵ *Du Plessis* (note 162 above) 198-201. For a detailed commentary, see D Futch ‘Du Plessis v De Klerk: South Africa's Bill of Rights and the Issue of Horizontal Application’ (1997) 22 *North Carolina Journal of International Law & Commercial Regulation* 1009.

¹⁶⁶ See *Mandela v Falati* 1994 SACLR LEXIS 290 (SC).

¹⁶⁷ See *Holomisa v Argus Newspapers Ltd* 1996 SACLR LEXIS 13 (SC).

of having committed racial violence. The Witwatersrand Division of the Supreme Court held that a defamatory statement relating to “free and fair political activity is constitutionally protected, even if false unless the plaintiff shows that, in all the circumstances of its publication, it was unreasonably made”.¹⁶⁸ In developing the common law of defamation applicable between private parties, the Court applied the constitutional principle of freedom of speech and expression and proposed the balancing test of reasonableness as a defence, as opposed to the existing *animus injuriandi* test.¹⁶⁹

In *Gardener v Whitaker*,¹⁷⁰ the Eastern Cape Division of the Supreme Court enunciated the rationale behind horizontality. The basic idea is that, since the foundation of society is to be found in the Bill of Rights, these rights would be undermined if the Constitution is limited to public law sphere to the exclusion of private law relationships. Thus, in *Motala v University of Natal*,¹⁷¹ a university’s admissions policy instituted an affirmative action program allowing a quota for the admission of Indian students to the medical school at the University of Natal and a non-uniform system for reviewing applicants. The Durban and Coast Local Division of the Supreme Court upheld a challenge to the policy, as constituting an unfair discrimination and, hence, a violation of the Bill of Rights. The Court also held the rights in question as capable of direct horizontal application.¹⁷²

¹⁶⁸ Above, 90.

¹⁶⁹ Above, 33-40.

¹⁷⁰ *Gardener v Whitaker* 1994 SACL R LEXIS 284 (SC).

¹⁷¹ *Motala v University of Natal* 1995 SACL R LEXIS 256 (SC).

¹⁷² See above, 22-23.

A combined reading of sections 8(2) and 173 of the final South African Constitution 1996 appears to provide bases for the horizontal application of rights. Section 8(2) provides that the Bill of Rights binds a natural or juristic person, “if, and to the extent that any of its provisions are applicable to such person taking into account the nature of the right and the nature of any duty imposed by the right”. Section 173 extends the power to develop the common law to the Constitutional Court. These sections, plus the fact that courts are bound by the Bill of Rights, lead to the conclusion that the Constitution ensures direct horizontal application of rights.¹⁷³ Indeed, some provisions of the Constitution admits of explicit application against private parties, like section 9(3) prohibiting unfair, privatised discrimination; section 15(2) imposing obligations on state aided institutions in respect of religious observance; section 29(3) placing obligations on private schools; and section 12(1)(c) on the right to be free from all forms of violence on all from either public or private sources.

In general, the Court must carry out a four-stage analysis to examine whether a horizontal application is suitable, in light of section 8(3).¹⁷⁴ It must satisfy itself that no legislation gives effect to the right as between private persons. It must determine whether there is a common law rule that gives effect to such a right. In the absence of a legislation or common law rule that gives effect to this right, the court must develop common law rules to give effect to that right. In applying or developing a common law rule, the court may limit the right, provided the limitation is in accordance with section 36(1).

¹⁷³ See D Davis *Democracy and Deliberation* (1999) 108-109; J Sarkin ‘The Common Law in South Africa: Pro Apartheid or Pro Democracy?’ (1999) 23 *Hastings International & Comparative Law Review* 1 18. See also J Sarkin ‘The Drafting of South Africa’s Final Constitution from a Human-Rights Perspective’ (1999) 47 *American Journal of Comparative Law* 67.

¹⁷⁴ Section 8(3)(a) of the South African Constitution 1996 requires courts, when applying a right to a private party, to give effect to the right by applying, or if necessary by developing the common law.

In *Minister of Public Works v Khayalami Ridge Environmental Association*,¹⁷⁵ the Constitutional Court applied the right of access to housing against a private environmental organisation that attempted to obstruct a government plan to build a temporary camp for flood victims. The Court held that the government's obligation to provide access to adequate housing outweighed other countervailing considerations, including absence of legislation authorising such a use and argument that the camp violated the municipal-planning scheme and environmental laws.

Sprigman and others argue that the South African Constitution does not provide for or mandate, but only permits, a direct horizontal application of rights.¹⁷⁶ They argue that the Constitution only preserves the indirect horizontal application of rights recognised by the Court in *Du Plessis* and that its section 8(3) is inconsistent with the scheme of direct horizontal application. They confine even indirect application of the Bill of Rights to those instances where legislation does not give effect to a right.¹⁷⁷

While debates about the direct horizontal application of rights in the South African Constitution continue, “we may”, says Wahi, “safely conclude that there exists a measure of direct horizontal application of certain rights and indirect horizontal effect with respect to other rights in the South African Constitution”.¹⁷⁸

The increasing judicialisation of corporate human rights behaviour shows that international law is not an unalterable orthodoxy. In the general conditions of life, today's

¹⁷⁵ *Minister of Public Works v Khayalami Ridge Environmental Association* 2001 (7) BCLR 652 (CC).

¹⁷⁶ See C Sprigman & M Osborne 'Du Plessis is Not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes' (1999) 15 *South African Journal of Human Rights* 25-30.

¹⁷⁷ See above, 37.

¹⁷⁸ Wahi (note 10 above) 393, citing FI Michelman 'The Bill of Rights, the Common Law, and the Freedom-Friendly State' (2003) 58 *University of Miami Law Review* 401-407-08.

unexamined faith may become tomorrow's heresy (and vice versa). Although there are fixed poles between which judges exercise an interstitial competence—constitutions, statutes, precedents, public policy, etcetera—, there are also “leeways for judicial choice”, as Stone terms judicial discretion and lawmaking.¹⁷⁹ Judges should walk through these “leeways” to work out norms on corporate accountability.

4. *The UN Draft Norms for TNCs*

The most comprehensive international statement on the human rights responsibilities of corporations was the UN Draft Norms for TNCs of 2003.¹⁸⁰ The Draft Norms was prepared in response to the resolution of the UN Sub-Commission on Human Rights, wherein the Sub-Commission asked its Working Group on the Working Methods and Activities of Transnational Corporations to “contribute to the drafting of relevant norms concerning human rights and transnational corporations and other economic units whose activities have an impact on human rights”.¹⁸¹ The Draft Norms recognises the primary role of states in guaranteeing human rights,¹⁸² but it also set out the key human rights responsibilities of TNCs¹⁸³ with some degree of specificity. It extends responsibilities to

¹⁷⁹ J Stone *Legal System and Lawyers' Reasonings* (1964) 234 274–78.

¹⁸⁰ See Draft Norms for TNCs (note 72 above). See, in general, Draft Commentary on the Norms of Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN4/Sub2/2003/XX E/CN4/Sub2/2003/WG2/WP1 [hereinafter Draft Commentary].

¹⁸¹ See UN Doc E/CN4/Sub2/RES/2001/3.

¹⁸² See Draft Norms for TNCs (note 72 above) para 1.

¹⁸³ As above. See also pmb1 (“*Recognizing* that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights”) (italics in the original).

TNCs on the human right to equal opportunity and non-discrimination,¹⁸⁴ right to security of persons,¹⁸⁵ and the prohibition of forced or compulsory labour.¹⁸⁶ Others are respect for national sovereignty,¹⁸⁷ consumer protection,¹⁸⁸ and environmental protection.¹⁸⁹ The Draft Norms calls on TNCs and other business enterprise to adopt, disseminate, and implement internal rules of operation, “[a]s an initial step towards implementing these Human Rights Responsibilities”.¹⁹⁰

One of the strongest criticisms of the Draft Norms comes from John Ruggie—the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (SRSG).¹⁹¹ The SRSG negated the Draft Norms for the “near-universal opposition” to it by business and the disinclination by governments to adopt them.¹⁹² He further argues that its legal and conceptual foundations are poorly conceived and, therefore, highly problematic in their potential effects.¹⁹³ He believes that, if implemented as a treaty, the Draft Norms could permit persons to sue a company for failing to provide extensive benefits to its employees and local

¹⁸⁴ See above, para 2.

¹⁸⁵ See above, para 3.

¹⁸⁶ See above, para 4.

¹⁸⁷ See above, para 10.

¹⁸⁸ See above, para 13 (calling on TNCs to act in accordance with fair business, marketing, and advertising practices and to take all necessary steps to ensure the safety and quality of the goods and services they provide).

¹⁸⁹ See above, para 14.

¹⁹⁰ See above, para 15.

¹⁹¹ John Ruggie, a Harvard professor, was appointed by the UN Secretary-General on 28 July 2005, pursuant to Commission on Human Rights Resolution 2005/69 E/CN.4/2005/L.10/Add.17 20 Apr 2005 [hereinafter Resolution 69], as approved by the Economic and Social Council Decision 2006/273 of 25 July 2005.

¹⁹² J Ruggie Opening Statement to UN Human Rights Council Geneva 25 Sept 2006 *available at* <http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf> [hereinafter Ruggie Address].

¹⁹³ Above.

communities, or for failing to prevent localized violations of human rights. In the best case scenario, it would do little more than keep lawyers in gainful employment for a generation; while in the worst case, they would turn TNCs into more benign twenty-first century versions of East India companies, undermining the capacity of developing states to generate independent and democratically controlled institutions capable of acting in the public interest.¹⁹⁴

Notwithstanding these fault lines, the UN Norms set important benchmarks for future normative initiatives. Often, the creation of standards based on consensus leads to a lowest common denominator result.¹⁹⁵ Thus, though not legally binding, the Norms point to the evolution of significant changes in global thinking about TNCs and the character and source of their regulation, with possible significant ramifications for domestic law.¹⁹⁶ The ideas embodied in the Norms, together with the global community's support, also "illustrate the development in fact of a mechanics of interplay between national, international, public, and private law systems in allocating and competing for regulatory power. The regularization and institutionalization of these mechanics evidence transnational law coming into its own as a separate field of power".¹⁹⁷

5. *The SRSG and His Mandate*

¹⁹⁴ Above.

¹⁹⁵ See Amnesty International *Letter to John Ruggie* OSG/2006/30/ja 27 Apr 2006 available at <http://www.reports-and-materials.org/Amnesty-Intl-comments-on-Ruggie-interim-report-27-Apr-2006.pdf> [hereinafter Amnesty Letter].

¹⁹⁶ See LC Backer 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' (2006) 37 *Columbia Human Rights Law Review* 287 287.

¹⁹⁷ Above.

The SRSG is mandated to identify and clarify standards of corporate responsibility and accountability for TNCs and other business enterprises with regard to human rights; to elaborate on the role of States in effectively regulating and adjudicating the role of these entities with regard to human rights, including through international cooperation; to research and clarify the implications for these entities of concepts such as “complicity” and “sphere of influence”; to develop materials and methodologies for undertaking human rights impact assessments of the activities of TNCs and other business enterprises; and to compile a compendium of best practices of States, TNCs, and other business enterprises.¹⁹⁸ This mandate “touches on foundational questions in the evolution of modern international law and governance”.¹⁹⁹

The SRSG submitted an Interim Report to the UN Human Rights Council in February 2006²⁰⁰ and a fuller report in March 2007.²⁰¹ In his Interim Report, the SRSG recommended a new approach for regulating TNCs’ activities, based on “principled pragmatism”. Under this approach, states would be the venue for calling TNCs to account; and he believes that rogue states that simply do not enforce human-rights standards would not easily weaken a treaty following this approach. Instead, a decision to enforce the standards would rest with governments of the corporations’ home countries. In his 2007 report, the SRSG noted that “it does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on

¹⁹⁸ See Resolution 69 (note 191 above) para 1.

¹⁹⁹ John Ruggie Opening Statement to UN Human Rights Council Geneva 25 Sept 2006 *available at* <http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf> [hereinafter Ruggie, Address].

²⁰⁰ See Ruggie Interim Report (note 155 above).

corporations. Even so, corporations are under growing scrutiny by the international human rights mechanisms”.²⁰² The SRSG reported on the many innovations that have occurred over the years in developing corporate responsibility and accountability. This Chapter has already examined some of these initiatives, but the SRSG was particularly enthused by soft law framework, which “exhibits innovation and policy diffusion”.²⁰³

Some commentators criticise the SRSG’s “principled pragmatism” approach, concerned that it “may lead to underestimating the need for binding legal principles and guidelines as well as the state of applicable international law”.²⁰⁴

5.5 Conclusion

Globalisation provides great opportunities to the world, but its benefits are unevenly shared and its costs are unevenly distributed. Africa has particularly not felt the distribution of benefits of globalisation in any significant way. The deep fault line between the rich and poor and the ever-increasing gap between the developed and developing countries pose a major threat to global prosperity, security, and stability. Multilateral institutions have a unique role to play in meeting the challenges and opportunities of globalization.²⁰⁵ Africa is part of the global community, and if the term

²⁰¹ See Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises A/HRC/4/035 9 Feb 2007 *available at* <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf> (hereinafter SRSG Report).

²⁰² Above, para 44.

²⁰³ Above, para 85 (adding: “The biggest challenge is bringing such efforts to a scale where they become truly systemic interventions”).

²⁰⁴ Amnesty Letter (note 195 above).

²⁰⁵ See Commission on Human Rights ‘Globalization and its impact on the full enjoyment of human rights’ Res 2003/23 pmbl (stressing, “globalization should be guided by the fundamental principles that underpin the corpus of human rights, such as equality, participation, accountability, non-discrimination, at both the national and international levels, respect for diversity and international cooperation and solidarity”).

has any meaning, then it must encompass “the one continent in which a genuinely global political, economic, and social program merges practical and moral considerations”.²⁰⁶

The emergent global governance needs some fundamental readjustments, given the failure or inability of states to control the negative impact of globalisation, including corporate human rights abuses. Existing initiatives have not afforded sufficient guarantees for the protection of persons or environments from corporate wrongs. It is true that international law no longer possesses the aesthetic purity of a straight line, thereby losing the certainty, predictability and regularity of a normative pyramid.²⁰⁷ It is equally true that the last thing victims of human rights violations need are more un-enforced declarations, but these are no reasons to throw away the baby with the bath water. What is required for international law’s redemption is to deconstruct its contradictions, and then reconstruct it—what Rorty calls ‘therapeutic redescription.’²⁰⁸ As for TNCs, lines of enunciated principles must connect dots of practice if shapes of legitimate rules are to emerge. “There can be no substitute,” says Amnesty International, “for the elaboration of general norms and standards with general applicability to corporate and other business conduct”.²⁰⁹

Although some domestic courts are increasingly taking on TNCs for human rights abuses, there are no corresponding international judicial mechanisms, especially where

²⁰⁶ H Kissinger *Does America Need a Foreign Policy? Toward a Diplomacy for the Twenty-first Century* (2002) 209.

²⁰⁷ See M Prost ‘Born Again Lawyer: FATU as an Antidote to the ‘Positivist Blues’ (2006) 7(12) *German Law Journal* 1037 1042.

²⁰⁸ R Rorty *Contingency, Irony, and Solidarity* (1989) 9.

²⁰⁹ Amnesty Letter (note 195 above). Cf Kinley & Chambers (note 126 above) 450 (“[A]n important element of the project to curtail human rights abuses by companies will be missing without a common, enforceable set of international standards to which transnational corporations are required to adhere, whether through domestic law or directly under international law.”).

domestic remedies are not available, adequate or sufficient. Whenever a general agreement is reached on those treaty norms that apply to TNCs, there will be need to elaborate and adopt additional protocols to permit individual and NGO petitions against TNCs before international human rights tribunals. Host and ratifying states could then annex such protocols to their joint venture and other agreements with TNCs, thus indirectly making them parties to such treaties. This is a guarded proposal, but it underscores the need for further research on the methodology for transposing existing human rights norms and mechanisms to TNCs.

In the meantime—and probably in the long run as well—states will remain primary bearers of human rights obligations,²¹⁰ but a narrow interpretation and application of the corpus of human rights subtract from its credibility. Non-states actors should be made to play active roles in vindicating human rights. TNCs, in particular, should become channels of blessings in advancing socio-economic rights in Africa, through active involvement in economic development. Like the OECD and the UN, the AU should work on elaborating standards for TNCs operating in Africa. African states and institutions should “adapt to a dynamic world and create regulation that protects all sectors of society”.²¹¹

²¹⁰ Cf ‘Globalization and its impact on the full enjoyment of human rights’ (note 111 above) para 1 (“*Recognizes that, while globalization, by its impact on, inter alia, the role of the State, may affect human rights, the promotion and protection of all human rights is first and foremost the responsibility of the State*”).

²¹¹ Aguirre (note 10 above) 56-7.

Chapter Six

AN ILLUSTRATIVE STUDY:

THE RIGHTS TO WORK AND TO SOCIAL SECURITY IN AFRICA

6.1 Introduction

This Chapter illustrates some of the propositions attempted in this thesis, using the rights to work and to social security (collectively social rights) as templates for analysis. It is both narrative and prescriptive, reviewing the international and municipal instruments on social rights and examining how wrong-footed policies and blind and bland implementation of neo-liberal economic programmes undermine the implementation of social rights in Africa. The Chapter calls on all stakeholders—the AU, its Member States, judicial institutions, and the civil society—to keep faith with the principle of indivisibility of all rights. It calls on states, especially, to adopt concrete and positive measures for the realisation of these rights.

While using the African Charter as a template for analysis, the Chapter will call in aid comparative international law and jurisprudence, including instruments of the International Labour Organisation (ILO). It will also invoke aspects of political economy, since it prescribes an integrated approach for the advancement of social rights.

6.2 The Legal Regime on Social Rights in Africa

Chapter One of the thesis discussed the “cross-cutting” nature of some rights, but some treaties make a point of enshrining “core” socio-economic rights. The African Charter guarantees such rights, including the right to work and equal remuneration for equal work;¹ the right to “the best attainable state of physical and mental health,” including medical care for the sick;² and the protection of the family, its morals, women, children, and the disabled.³ This Segment focuses on two social rights—the rights to work and to social security—as templates for analysis.

6.2.1 *The Right to Work in Text and Context*

Work is a human right because it is a means to an end—human survival. It is also a measure of human dignity, by creating the material wealth in society and making human flourishing possible. Work enhances social solidarity, which is vital for a society’s survival. Employment, which is integral to work, ensures income for people and plays a positive role in economic growth. It stimulates consumption and production and ensures the viability and expansion of the domestic market. The right to work, thus, is both an inherent and instrumental freedom. As an instrumental freedom, work promotes development and contributes generally to the expansion of human freedom.⁴

¹ See African Charter on Human and Peoples’ Rights adopted 27 June 1981 entry into force 21 Oct 1986 Doc OAU/CAB/LEG/67/3/Rev5 (1982) 21 *International Legal Materials* 59 [hereinafter African Charter or Charter] art 15.

² See above, art 16.

³ See above, art 18.

⁴ Cf A Sen *Development as Freedom* (1999) 37 (“The effectiveness of freedom as an instrument lies in the fact that different kinds of freedom interrelate with one another, and freedom of one type may greatly help in advancing freedom of

Recognising the importance of work, the African Charter guarantees it as a human right: “Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”⁵ In fact, the Charter uniquely views work as a duty, by providing that every individual has a duty “[t]o work to the best of his abilities and competence ...”⁶ Commenting on the Charter’s provision, Sieghart notes: “This is how it in fact appears to many millions of subsistence farmers and their families [in Africa], who claim no ‘right’ to tend their crops, but would rapidly starve if they did not.”⁷ Sieghart’s claim is supported by many municipal constitutions in Africa, which also classify work as a duty,⁸ including those of Angola,⁹ Cape Verde,¹⁰ Egypt,¹¹ Equatorial Guinea,¹² Libya,¹³ Mali,¹⁴ Mozambique,¹⁵ Sao Tome and Principe,¹⁶ and Tanzania.¹⁷

other types. The two roles are thus linked by empirical connections, relating freedom of one kind to freedom of other kinds”).

⁵ African Charter (note 1 above) art 15.

⁶ Above, art 29(6).

⁷ P Sieghart *The International Law of Human Rights* (1983) 216 n.1.

⁸ See, in general, C Heyns (ed) *Human Rights Law in Africa* (vol 2 2004) [hereinafter *Human Rights Law in Africa*] (citing right to work provisions in the constitutions of African Countries).

⁹ See Constitution of Angola sec 46(1).

¹⁰ See Constitution of Cape Verde sec 60(2).

¹¹ See Constitution of Egypt sec 13.

¹² See Constitution of Equatorial Guinea sec 25.

¹³ See Constitution of Libya sec 4.

¹⁴ See Constitution of Mali sec 19.

¹⁵ See Constitution of Mozambique sec 88(1).

¹⁶ See Constitution of Sao Tome & Principe sec 41(1).

¹⁷ See Constitution of Tanzania sec 25(1).

The African Charter's provision on the right to work is vaguely phrased, making its scope from the text alone unclear. Is Article 15 a noun or a verb? Does it vest a duty on a government to provide work, or is it merely a negative obligation to secure "equitable and satisfactory conditions" for work? I take the position that the Charter's provision is not merely a verb, asserting something about a subject, but that it commits states to realise this right through a national employment policy that provides opportunities for work, with institutions and techniques to achieve that objective. This conclusion is fortified by the fact that one of the objects of the Charter, as reflected in its preamble, is the satisfaction of economic, social, and cultural rights.¹⁸ Besides, the primary responsibility of a state is the welfare of its citizens and the legitimacy of a government depends on whether it meets the basic needs of its citizens. A state's authority to make binding law puts it in a unique position to generate revenue through taxes and other fees, which should enable it to obtain resources needed to fulfil cost-intensive human rights obligations.¹⁹

The Universal Declaration of Human Rights'²⁰ provisions on the right to work include the right "to free choice of employment",²¹ while the ICESCR includes "the right of everyone to the opportunity to gain his living by work which he freely chooses or

¹⁸ Although the preamble is not part of a treaty's substantive provisions, it can be taken into consideration when interpreting the treaty; in fact, consideration of the preamble is normally necessary in cases of doubt. See Vienna Convention on the Law of Treaties adopted 22 May 1969 1155 UNTS 331 entry into force 27 Jan 1980 [hereinafter Vienna Convention] art 31 (providing that "the context for the purpose of the interpretation of a treaty shall . . . includ[e] its preamble").

¹⁹ See JA Hessbruegge 'Human Rights Violations Arising from Conduct of Non-State Actors' (2005) 11 *Buffalo Human Rights Law Review* 21 26.

²⁰ Universal Declaration of Human Rights adopted 10 Dec 1948 GA Res 217 A (III) GAOR 3d Sess [hereinafter UDHR].

²¹ Above, art 23(1).

accepts”.²² The Protocol to the African Charter on the Rights of Women in Africa²³ requires States Parties to “guarantee women equal opportunities in work and career advancement and other economic opportunities”,²⁴ such as “equality of access to employment,”²⁵ “equal remuneration for jobs of equal value for women and men,”²⁶ and “freedom to choose their occupation”.²⁷

The phrase “equitable and satisfactory conditions”, as used in the African Charter,²⁸ is “highly subjective” and lacks any precise definition.²⁹ Its equivalent provisions in the UDHR and ICESCR are not helpful either; they simply refer to “just and favourable” conditions.³⁰ Further, none of these instruments prescribes the means for achieving these “equitable and satisfactory” or “just and favourable” ends. The European Social Charter (ESC)³¹ could provide some guidance on the interpretation of the African Charter’s provision, though it is not binding on African states. The ESC obligates its Contracting Parties to “issue safety and health regulations [for employers and workers]”; “provide for the enforcement of such regulations by measures of supervision”; and “consult, as

²² International Covenant on Economic, Social and Cultural Rights adopted 16 Dec 1966 entry into force 23 Mar 1976 993 UNTS 3 [hereinafter ICESCR] art 6(1).

²³ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa adopted 11 July 2003 [hereinafter Women Protocol].

²⁴ Above, art 13.

²⁵ Above, art 13(a).

²⁶ Above, art 13(b).

²⁷ Above, art 13(d).

²⁸ See African Charter (note 1 above) art 15.

²⁹ F Ougergouz *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003) 184 (arguing that “it would have been preferable to define [the phrase] more precisely”).

³⁰ UDHR (note 20 above) art 23(1); ICESCR (note 22 above) art 7.

³¹ European Social Charter adopted 18 Oct 1961 529 UNTS 89 (entered into force 26 Feb 1965) [hereinafter ESC].

appropriate, employers' and workers' organisations on measures intended to improve industrial safety and health".³²

The right to work includes the corollary right to equal pay for equal work, which is an aspect of economic justice demanding fair compensation for a person's labour in relation to others. This right is "precisely drafted" and defined in international treaties to be judicially enforceable.³³ The African Charter provides that every individual "shall receive equal pay for equal work".³⁴ This is equivalent to the Women Protocol's "equal remuneration for jobs of equal value";³⁵ the UDHR's "just and favourable remuneration";³⁶ and the ICESCR's "[f]air wages and equal remuneration for work of equal value".³⁷ In each case, the test is the standard of living the pay provides for the worker and his family, since living standards relate to the richness of a person's life.³⁸ The UDHR links this "standard" not only to factors of food, clothing, and housing—which form a specific subject-matter in Article 11 of ICESCR—but also to health, medical care, social service, and security.³⁹ Thus, the pay must be one "worthy of human dignity",⁴⁰ or "suitable" and "in proportion to his capacity and skill",⁴¹ or "a decent

³² Above, art 3.

³³ See RR Churchill & U Khaliq 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15 *European Journal of International Law* 417 420 (arguing also that for rights such as equal pay or consultation rights in the workplace, a judicial remedy could be suitable).

³⁴ African Charter (note 1 above) art. 15.

³⁵ Women Protocol (note 23 above) art 13(b).

³⁶ UDHR (note 20 above) art 23(3).

³⁷ ICESCR (note 22 above) art 7(a)(i).

³⁸ See J Dreze & A Sen *Hunger and Public Action* (1989) 12.

³⁹ See UDHR (note 20 above) art 25(1).

⁴⁰ Above, art 23(3).

living”.⁴² In *Malawi African Association v Mauritania*,⁴³ the African Commission held that “unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being”,⁴⁴ a decision that further demonstrates the interconnectedness of all rights.

The African Charter does not provide for the right to rest and leisure, but the African Charter on the Rights and Welfare of the Child⁴⁵ understandably guarantees this right to children, including the right “to engage in play and recreational activities appropriate to the age of the child”.⁴⁶ Universal instruments guarantee to workers the right to rest and leisure, starting with the UDHR, which guarantee includes “reasonable limitations of working hours” and “holidays with pay”.⁴⁷ The ICESCR treats rest and leisure as part of “just and favourable conditions of work”; and includes the right to “remuneration for public holidays”.⁴⁸ These other instruments may have influenced the African Commission in integrating the right to rest and leisure in its guidelines for states’ reports on socio-economic rights. The guidelines enjoin states to report on “the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised

⁴¹ American Declaration of the Rights and Duties of Man art XIV adopted 2 May 1948 Ninth International Conference of American States *reprinted in* Basic Documents Pertaining To Human Rights in the Inter-American Systems OEA/Ser.L/V/II.71 17 (1988) [hereinafter American Declaration].

⁴² ICESCR (note 22 above) art 7(a)(ii).

⁴³ *Malawi Afr Ass’n v Mauritania* Comm Nos 54/91 61/91 98/93 164/97 & 210/98 1999–2000 African Annual Activity Report Annex VII.

⁴⁴ Above, para 135.

⁴⁵ African Charter on the Rights and Welfare of the Child adopted 11 July 1990 entry into force 28 Nov 1999 OAU Doc CAB/LEG/TSG/Rev 1 [hereinafter African Child Charter].

⁴⁶ Above, art 12.

⁴⁷ UDHR (note 20 above) art 24.

⁴⁸ See ICESCR (note 22 above) art. 7(d).

and guaranteed by the present Charter”, including the rights to rest, leisure, limitation of workers hours, and periodic holidays with pay.⁴⁹

The African Charter also contains no provision protecting vulnerable groups from forced or exploitative labour, which is surprising, considering that forced and exploitative labour, in particular of children, had been in practice long before the adoption of the Charter.⁵⁰ One of the shortcomings of the Charter was its failure to adequately provide for rights of vulnerable groups, such as women and children. Separate treaties or “special protocols”⁵¹ now address these omissions. The African Child Charter, on its part, protects every child “from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral, or social development”.⁵² The relevant judicial institutions in Africa should interpret provisions abolishing child labour to include the right to compensation for work performed, as this is a necessary condition for abolishing the practice. Meanwhile, the Women Protocol guarantees to women the right to protection from exploitation by their employers;⁵³ the equal application of taxation laws to women and men;⁵⁴ and the “right of

⁴⁹ See African Comm’n on Human and Peoples’ Rights State Reporting Procedure: Information Sheet No 4 [hereinafter State Reporting Procedure] available at www.achpr.org [hereinafter African Commission website].

⁵⁰ See eg NJ Udombana ‘Child Labour and the Challenges of Human Rights in Nigeria’ (1998) 11(2) *Lesotho Law Journal* 269.

⁵¹ See African Charter (note 1 above) art 66 (providing “special protocols or agreements may, if necessary, supplement” the Charter’s provisions).

⁵² African Child Charter (note 45 above) art 15(1).

⁵³ See Women Protocol (note 23 above) art 13(d).

⁵⁴ Above, art 13(j).

salaried women to the same allowances and entitlements as those granted to salaried men for their spouses and children”.⁵⁵

Although the African Charter does not expressly provide for the right to form and join trade unions, this right could be imputed from the Charter’s guarantee of the right to freedom of association,⁵⁶ since the right to work implies the corollary right to organize or unionise in pursuit of workers’ common interests, including the right to strike. Comparative law and jurisprudence support this conclusion. The European Convention guarantees the right to freedom of association and links it with an individual’s “right to form and to join trade unions for the protection of his interests”.⁵⁷ Some scholars regard the Convention’s Article 11 as “unhelpful in its vagueness”;⁵⁸ that is to say, “[t]he protection offered by Article 11 to the rights to freedom of assembly and association, is what might be described as bottom line protection”.⁵⁹ In *National Union of Belgian Police v Belgium*,⁶⁰ the European Court of Human Rights held that the right to form and

⁵⁵ Above, art 13(k).

⁵⁶ African Charter (note 1 above) art 10. Cf UDHR (note 20 above) arts 20, 23 (guaranteeing the right to freedom of peaceful assembly and association as well as the “right to form and to join trade unions”) and International Covenant on Civil and Political Rights adopted 16 Dec 1966 entry into force 23 Mar 1976 GA Res 2200 A (XXI); UN GAOR 21st Sess Supp No 16 UN Doc A/6316 (1966) 999 UNTS 171 [hereinafter ICCPR] art 22 (assuring that “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions”).

⁵⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms opened for signature 4 Nov 1950 ETS No 5 213 UNTS 221 *as amended by* Protocol No 11 (entry into force 1 Nov 1998) ETS No 155 (1994) 33 *International Legal Material* 960 [hereinafter European Convention or ECHR] art 11(1). Cf ESC (note 31 above) art 5.

⁵⁸ S Lewis-Anthony ‘Case Law of Article 11 of the European Convention on Human Rights’ (1994) 34A *Yearbook of European Convention on Human Rights* 27 37 & 43.

⁵⁹ Above.

⁶⁰ *Nat’l Union of Belgian Police v Belgium* 19 Eur Ct HR (ser A) (1975).

join trade unions is not a separate right but a part of the general right to freedom of association.⁶¹

The European Court has, according to Mowbray, been “reluctan[t] to recognise the existence [of] unqualified substantive trade union rights, such as the right to strike”, arguably, because of “the Court’s desire not to encroach upon the regime of economic and social rights created by the European Social Charter”.⁶² However, in *Swedish Engine Drivers’ Union v Sweden*,⁶³ the Court held that the right to form and join trade unions applies to a state in its capacity as an employer, whether the state’s relations with its employees is governed by public or private law.⁶⁴ The Court reasoned that “[t]he [European] Convention nowhere makes an express distinction between the function of a Contracting State as holder of public power and its responsibilities as employer”.⁶⁵ Furthermore, the phrase “for the protection of his interests”, as used in the European Convention, is not redundant: it denotes purpose and shows that “the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible”.⁶⁶

⁶¹ Above, paras 37–38. Cf B Hepple ‘Freedom to Form and Join or Not to Join Trade Unions’ (1994) 34A *Yearbook of European Convention on Human Rights* 162 168 (arguing that the specific reference to trade unions in Article 11 of the ECHR was designed to ensure that they would be treated as “associations” under the Convention, irrespective of their categorization and status under the domestic law of member states).

⁶² A Mowbray *Cases and Materials on the European Convention on Human Rights* (2001) 563.

⁶³ *Swedish Engine Drivers’ Union v Sweden* 20 Eur Ct HR (Ser A) 617 (1976).

⁶⁴ Above, para 37.

⁶⁵ Above.

⁶⁶ Above, para 40. *Contra Nat’l Union of Belgian Police* 19 Eur Ct HR (ser A) para 13 (Fitzmaurice J concurring) (arguing that the phrase “for the protection of his interests” may have made “certainty more certain”, but that it “does not strictly add anything of substance that would not already be there”).

The ICESCR expressly guarantees “the right of everyone to form trade unions and join the trade union of his choice . . . for the promotion and protection of his economic and social interests”.⁶⁷ It guarantees to trade unions the right “to establish national federations or confederations” and the latter’s right “to form or join international trade-union organizations”,⁶⁸ obviously envisaging such organizations as the ILO. The ICESCR also guarantees to trade unions the right “to function freely subject to no limitations other than those prescribed by law and which are necessary ... for the protection of the rights and freedoms of others”.⁶⁹ Lastly, it guarantees the right to strike,⁷⁰ which is the fulcrum of the right to work.

These treaties subject the right to freedom of association (including trade union rights) to “claw-back clauses”, which permit, “in normal circumstances, breach of an obligation for a specified number of public reasons”.⁷¹ Under the ICESCR, the right to strike must be “exercised in conformity with the laws of the particular country”,⁷² while the exercise of the right to freedom of association under the African Charter is predicated on the beneficiary “abid[ing] by the law”.⁷³ The European Convention, for its part, prohibits any restriction on the exercise of the right to freedom of association, “other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the

⁶⁷ See ICESCR (note 22 above) art 8(1)(a).

⁶⁸ See above, art 8(1)(b).

⁶⁹ See above, art 8(1)(c).

⁷⁰ See above, art 8(1)(d).

⁷¹ R Higgins ‘Derogations Under Human Rights Treaties’ (1978) 48 *British Yearbook of International Law* 281.

⁷² ICESCR (note 22 above) art 8(1)(d).

protection of health or morals or for the protection of the rights and freedoms of others”.⁷⁴ Furthermore, the right to freedom of association in the African Charter is subject to the obligation to “preserve and strengthen social and national solidarity” imposed by Article 29,⁷⁵ but the Charter fails to define the terms “social and national solidarity”. Depending on the context, states could abuse such apparently harmless phraseology through subjective interpretations. Duties and ideals of solidarity may impinge, in clear and serious ways, on the Charter’s definitions of rights. Besides, the idea of solidarity, once threatened, may allow forced participation in an organization.

Fortunately, the African Commission does not treat “claw-back clauses” as ghosts to be dreaded. It asserts that the mention of such a clause is not a license for states to use domestic laws to justify deprivation of personal freedoms.⁷⁶ The Commission further states that “[t]he regulation of the exercise of the right to freedom of association should be consistent with States’ obligations under the African Charter”⁷⁷ And, in *Civil Liberties Organization (in respect of Bar Association) v Nigeria*,⁷⁸ the Commission stressed that “competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional

⁷³ African Charter (note 1 above) art 10(1).

⁷⁴ ECHR (note 57 above) art 11(2).

⁷⁵ African Charter (note 1 above) arts 10(2), 29(4).

⁷⁶ See *Purohit v Gambia* Comm No 241/2001 2002–2003 African Annual Activity Report Annex VII para 64.

⁷⁷ *Resolution on the Right to Freedom of Association* Fifth Annual Activity Report of the Afr Comm’n on Hum and Peoples’ Rts 1991–1992 Annex VII para 3 [hereinafter *Resolution on Freedom of Association*].

⁷⁸ *Civil Liberties Org v Nigeria* Comm No 101/93 (2000) AHRLR (ACHPR 1994) reprinted in Seventh Annual Activity Report of the Afr Comm’n on Hum and Peoples’ Rts 1994–1995 Annex VI [hereinafter *CLO v Nigeria*].

provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards”.⁷⁹

6.2.2 *The Right to Social Security in Text and Context*

Social security could be defined as the set of policy instruments implemented to compensate for the financial consequences of a number of risks should they occur.⁸⁰ Liebenberg defines it as “those measures that aim at guaranteeing a certain minimum subsistence level, as well as protecting the income of people in situations where it is imperilled [sic] owing to various contingencies”.⁸¹ These definitions are somewhat restrictive in that they are concerned more with replacing redistributive mechanisms that break down in the process of socio-economic change. In truth, social security is the employment of social means to prevent deprivation or vulnerability to deprivation.⁸² It includes formal (government regulated, public) and informal arrangements. Its two strands are social insurance and social assistance; the former is financed by contributions from employers and employees, with benefits accruing to contributors; the latter is financed by government revenue and targeted at those mostly in need.⁸³

⁷⁹ Above, para 15. Cf ‘Resolution on the Right to Freedom of Association’ Fifth Annual Activity Report of the African Commission on Human and Peoples’ Rights 1991–1992 Annex VII [hereinafter Resolution on Freedom of Association] para 2.

⁸⁰ See V Moore *et al* ‘The Concept of Social Security’ in MP Olivier *et al* (eds) *Social Security Law: General Principles* (1999) 7.

⁸¹ S Liebenberg ‘The Right to Social Security: Response from a South African Perspective’ in D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002) 147 155 [hereinafter *Exploring the Core Content of Socio-Economic Rights*].

⁸² See J Dreze & A Sen ‘Public Action for Social Security: Foundations and Strategy’ in E Ahmad *et al* (eds) *Social Security in Developing Countries* (1991) 3 5 [hereinafter *Social Security in Developing Countries*].

⁸³ See International Labour Office *Introduction to Social Security* (1984) 3–5. See, in general, ILO Constitution Annex III(f) (2004) (recognizing the ILO’s obligation regarding “the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care”).

In Africa, social security is often thought of in terms of pension funds, medical insurance, and disability schemes.⁸⁴ Either way, social security, like work, is important for the well-being of workers, their families, and the community as a whole. If properly managed, social security enhances national productivity and supports economic development. Empirical research has shown that countries with the best social protection systems have extremely high levels of productivity.⁸⁵ An ILO report suggests that by offering good protection to their workforce, countries will further enhance the productive potential of their economies.⁸⁶ This understanding probably explains why most Western societies place a high premium on social security, though they deceive their African counterparts into adopting phoney austerity measures, downsizing their work force, and leaving citizens to their own fate.⁸⁷

Mainstream international human rights instruments recognize social security as a basic human right; among these are the ICESCR,⁸⁸ ESC,⁸⁹ American Declaration,⁹⁰ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.⁹¹ The ESC's provisions is more expansive and covers four category of persons: “[a]ll workers and their dependents”, who are entitled to

⁸⁴ See J von Braun ‘Social Security in Sub-Saharan Africa: Reflections on Policy Challenges’ in *Social Security in Developing Countries* (note 82 above) 395-396.

⁸⁵ See eg R Arjona *et al* ‘Growth, Inequality and Social Protection’ (2003) 29 *Canadian Public Policy* 119.

⁸⁶ See ILO *World Labour Report 2000: Income Security and Social Protection in a Changing World* (2000) 51–72 [hereinafter *ILO World Labour Report 2000*].

⁸⁷ Below Part III.

⁸⁸ See ICESCR (note 22 above) art 9.

⁸⁹ See ESC (note 31 above) parts I & II.

⁹⁰ See American Declaration (note 41 above) art 16.

“social security”;⁹² “[a]nyone without adequate resources”, who is entitled to “social and medical assistance”;⁹³ “[e]veryone”, who is entitled to “social welfare services”;⁹⁴ and “[d]isabled persons”, who are entitled to “vocational training, rehabilitation and resettlement, whatever the origin and nature of their disability”.⁹⁵ The UDHR guarantees to “[e]veryone, as a member of society, ... the right to social security”.⁹⁶ It expands security in six specified eventualities: “unemployment, sickness, disability, widowhood, old age, [and] other lack of livelihood in circumstances beyond his control”.⁹⁷ The ICESCR similarly recognises “the right of everyone to social security, including social insurance,”⁹⁸ but it fails to specify eventualities that could give rise to social security and insurance.

Like general international human rights law, the African human rights normative structure guarantees the right to social security, though some of treaties are vaguely worded. The African Charter seemingly limits the right to social security to “[t]he aged and the disabled” who are entitled to “special measures of protection in keeping with their physical or moral needs”.⁹⁹ The Women Protocol guarantees social insurance, *inter*

⁹¹ See Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights adopted 17 Nov 1988 OASTS No 69 (entered into force 16 Nov 1999) art 9.

⁹² ESC (note 31 above) part I (12).

⁹³ Above, part I(14).

⁹⁴ Above, part I(13).

⁹⁵ Above, part I(14).

⁹⁶ UDHR (note 20 above) art 22.

⁹⁷ Above, art 25.

⁹⁸ ICESCR (note 22 above) art 9.

⁹⁹ African Charter (note 1 above) art 18(4).

alia, to women working in the informal sector¹⁰⁰ and to “poor women and women heads of families including women from marginalized population groups”.¹⁰¹ The African Child Charter also guarantees to children the right to social security, which includes basic nutrition, shelter, basic health care services, and social services.¹⁰² For handicapped children, this guarantee includes the right to “special measures of protection in keeping with [their] physical and moral needs and under conditions which ensure [...] dignity, promote [...] self-reliance and active participation in the community”.¹⁰³

The ILO has taken pains to elaborate standards on social security, including the Social Security (Minimum Standards) Convention;¹⁰⁴ Equality of Treatment (Social Security) Convention;¹⁰⁵ Employment Injury Benefits Convention;¹⁰⁶ and Invalidity, Old-Age and Survivors’ Benefits Convention.¹⁰⁷ Others are the Medical Care and Sickness Benefits Convention;¹⁰⁸ Maintenance of Social Security Rights Convention;¹⁰⁹ Employment Promotion and Protection Against Unemployment Convention;¹¹⁰ Home

¹⁰⁰ See Women Protocol (note 23 above) art 13(f).

¹⁰¹ Above, art 24(a).

¹⁰² See African Child Charter (note 45 above) art 1.

¹⁰³ Above, art 13.

¹⁰⁴ See Social Security (Minimum Standards) Convention No 102 adopted 28 June 1952 [hereinafter Convention 102]. This and other ILO conventions listed hereunder are *available at* <http://www.ilo.org/ilolex/english/convdisp1.htm>.

¹⁰⁵ See Equality of Treatment (Social Security) Convention No 118 adopted 28 June 1962 [hereinafter Convention 118].

¹⁰⁶ See Employment Injury Benefits Convention No 121 adopted 8 July 1964 [Schedule I amended in 1980] [hereinafter Convention 121].

¹⁰⁷ See Invalidity Old-Age and Survivors’ Benefits Convention No 128 adopted 29 June 1967 [hereinafter Convention 128].

¹⁰⁸ See Medical Care and Sickness Benefits Convention No 130 adopted 25 June 1969 [hereinafter Convention 130].

¹⁰⁹ See Maintenance of Social Security Rights Convention No 157 adopted 21 June 1982 [hereinafter Convention 157].

¹¹⁰ See Employment Promotion and Protection Against Unemployment Convention No 168 adopted 21 June 1988 [hereinafter Convention 168].

Work Convention;¹¹¹ and Maternity Protection Convention.¹¹² As an illustration, Convention 102 obligates ILO Member States to comply, at the time of ratification, with at least three of the following parts of the Convention: medical care (“of a preventive or curative nature”¹¹³), sickness benefits, unemployment benefits, old age benefits, worker’s compensation, family, disability, maternity, and survivor’s benefits.¹¹⁴ Of the enumerated risks, States must also accept at least one provision concerning unemployment, old-age, workers’ compensation, disability, or survivors’ benefits.¹¹⁵ For medical benefits, for example, the protected persons shall comprise:

- (a) prescribed classes of employees, constituting not less than [fifty percent] of all employees, and also their wives and children; or
- (b) prescribed classes of economically active population, constituting not less than [twenty percent] of all residents, and also their wives and children; or
- (c) prescribed classes of residents, constituting not less than [fifty percent] of all residents; or
- (d) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees constituting not less than [fifty percent] of all employees in industrial workplaces employing 20 persons or more, and also their wives and children.¹¹⁶

¹¹¹ See Home Work Convention No 177 adopted 20 June 1996 [hereinafter Convention 177].

¹¹² See Maternity Protection Convention No 183 adopted 15 June 2000 [hereinafter Convention 183].

¹¹³ See Convention 102 (note 104 above) art 7.

¹¹⁴ See above, art 2.

¹¹⁵ See above.

¹¹⁶ Above art 9.

Some ILO conventions seek to promote social security coverage for persons outside regular wage employment. The Home Work Convention provides that “national policy on home work shall promote, as far as possible, equality of treatment between homeworkers and other wage earners” in areas including statutory social security protection and maternity protection.¹¹⁷ Its accompanying Recommendation 184 proposes that social protection for home workers can be achieved through the extension and adaptation of existing social security schemes and/or through the development of special schemes or funds.¹¹⁸ The ILO has equally elaborated soft laws on social security, including the Income Security Recommendation of 1944.¹¹⁹ The Recommendation provides: “Social insurance should afford protection, in the contingencies to which they are exposed, to all employed and self-employed persons, together with their dependants”.¹²⁰ Another is the Job Creation in Small and Medium-Sized Enterprises Recommendation of 1998, which calls on states to “review labour and social legislation”, *inter alia*, to determine whether social protection extends to workers in these enterprises, whether there are adequate provisions to ensure compliance with social security regulations covering the standard contingencies, and whether there is a need for supplementary social protection measures for workers in these categories.¹²¹

¹¹⁷ Convention 177 (note 111 above) art 4.

¹¹⁸ ILO Recommendation Concerning Home Work No 184 para 25 adopted 20 June 1996 available at <http://www.ilo.org/ilolex/english/reccdisp1.htm>.

¹¹⁹ ILO Income Security Recommendation No 67 adopted 12 May 1944 available at <http://www.ilo.org/ilolex/english/reccdisp1.htm>.

¹²⁰ Above, para 17.

¹²¹ See ILO Job Creation in Small and Medium-Sized Enterprises Recommendation No 189 para 7 adopted 17 June 1998 available at <http://www.ilo.org/ilolex/english/reccdisp1.htm> (last visited 21 Nov 2005).

6.3 The Nature of Obligations on Social Rights

After highlighting the general obligations of states in relation to social rights, this segment proceeds to examine these obligations in state practice, noting the general acceptance of regional and universal instruments guaranteeing social rights by African states and the constitutionalisation of these rights.

6.3.1 General Obligations

The fulfilment of social rights requires the existence of a planned policy of employment as well as special measures to help those who are disadvantaged in seeking jobs due, especially, to disparities based on sex or age. It involves measures designed to promote, in the language of the South Africa's 1993 interim Constitution, "the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all".¹²² It includes the provision of "technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual".¹²³

Social rights obligations also include making appropriate means of redress or remedies available to any aggrieved individual or group and putting in place appropriate

¹²² South Africa (Interim) Constitution 1993 sec 26(2). *Accord Declaration on the Right to Development* GA Res 41/128 art 8(1) UN Doc A/RES/41/128 (4 Dec 1986) [hereinafter DRD] (urging states to "ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income").

¹²³ ICESCR (note 22 above) art 6(2) (referring to the steps necessary to achieve realization of the right to work).

means of ensuring governmental accountability.¹²⁴ This is often a difficult measure to take because, unlike ordinary legal rights, “human rights” are primarily claims against the state itself and their enjoyments are made possible by limiting sovereignty. In relation to trade union rights, the state must create, through national laws, conditions that enable trade unions to strive to protect their members’ interests.¹²⁵ A state’s failure to enforce private employers’ compliance with basic labour standards will obviously be a violation of its obligation to protect human rights; in particular, it may be a violation of the right to work or to just and reasonable conditions of work.¹²⁶ Likewise a state’s failure to ensure that there is no work-related harassment on account of sex, race, ethnicity or opinions also violates its obligation to protect human rights.¹²⁷

The African Charter requires states to submit periodic reports “on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter”.¹²⁸ Under the African Commission’s guidelines on reports, states are expected to report, *inter alia*, on social security, particularly on the main features in force for each branch of social security, including benefits for medical, sickness, maternity, invalidity, old-age, survivor, employment injury, unemployment, and family.¹²⁹ Additionally, states should report on factors and difficulties in realising the right to social security, the progress achieved on new forms of social security, the

¹²⁴ See CESCR ‘Domestic Application of the Covenant para 2’ General Comment 9 UN Doc E/1999/22 Annex IV.

¹²⁵ See *Nat’l Union of Belgian Police* 19 Eur Ct HR at para 39. Cf *Schmidt and Dahlstrom v Sweden* 21 Eur Ct HR (ser A) at para 36 (1976) (stating that the state is at liberty to choose the means to be used towards this end).

¹²⁶ See ‘The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights’ (1998) 20 *Human Rights Quarterly* 691 194 [hereinafter Maastricht Guidelines].

¹²⁷ Above, 695.

¹²⁸ African Charter (note 1 above) art 62.

extension of existing schemes to further groups of the population, and the improvements in the nature and level of benefits.¹³⁰

Unlike the African Charter, the Women Protocol clearly specifies states' obligations regarding social rights, including the obligation to "adopt and enforce legislative and other measures to guarantee women equal opportunities in work, career advancement, and other economic opportunities".¹³¹ It further obligates states to "ensure transparency in recruitment, promotion and dismissal of women and [to] combat and punish sexual harassment in the workplace";¹³² to "create conditions [that] promote and support the occupations and economic activities of women, in particular, within the informal sector";¹³³ and to "establish a system of protection and social insurance for women working in the informal sector and sensitise them to adhere to it".¹³⁴ The Protocol further commits states to "introduce a minimum age for work and to prohibit the employment of children below that age, and prohibit, combat and punish all forms of exploitation of children, especially [that of girls];¹³⁵ to "take the necessary measures to recognise the economic value of the work of women in the home";¹³⁶ and to "guarantee adequate and paid pre- and post-natal maternity leave in both the private and public sectors."¹³⁷ For

¹²⁹ See, in general, State Reporting Procedure (note 49 above).

¹³⁰ See above.

¹³¹ Women Protocol (note 23 above) art 13.

¹³² Above art 13(c).

¹³³ Above art 13(e).

¹³⁴ Above art 13(f).

¹³⁵ Above art 13(g).

¹³⁶ Above art 13(h).

¹³⁷ Above art 13(i).

women in distress, the Protocol commits states to ensure their protection and to provide an environment suitable to their condition and their special physical, economic and social needs.¹³⁸ These are revolutionary provisions, if one realizes that majority of African women work in the informal sector where existing laws do not always recognize or remunerate such activities.¹³⁹

In the area of social rights, states' obligations must be read in conjunction with specific obligations laid down under relevant ILO conventions and recommendations. (It is important to note that almost all African states' have membership in the ILO.)¹⁴⁰ The 1998 ILO Declaration of Fundamental Principles and Rights at Work is one response with particular emphasis on Core Labour Standards.¹⁴¹ The promotional Declaration states, *inter alia*,

that all Members, even if they have not ratified the Conventions . . . have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

¹³⁸ Above art 24(a).

¹³⁹ See, in general, CK Omari *Women in the Informal Sector* (1995) (arguing “women’s participation in the informal business sector . . . cannot be thoroughly understood outside the framework . . . of the capitalist mode of production [and] the impact of international capital on the household economy”).

¹⁴⁰ Alphabetical List of ILO Member Countries is available at <http://www.ilo.org/public/english/standards/relm/country.htm>

¹⁴¹ See ILO Declaration on Fundamental Principles and Rights at Work July 1998 Doc CIT/1998/PR20A [hereinafter ILO Declaration on Fundamental Principles].

- a. freedom of association and the effective recognition of the right to collective bargaining;
- b. the elimination of all forms of forced or compulsory labour;
- c. the effective abolition of child labour; and
- d. the elimination of discrimination in respect of employment and occupation.¹⁴²

The Declaration has been described as “a common vision of the necessary social dimension of progress”¹⁴³ and its application to all ILO Member States regardless of ratification of relevant conventions as “nothing short of a revolution in legal terms”.¹⁴⁴ It is within this context that such ILO conventions as the Employment Policy Convention¹⁴⁵ make good sense for Africa. The Convention provides that its State Parties shall “declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment”.¹⁴⁶ Such a policy should be aimed at ensuring that “there is work for all who are available for and seeking work”; that “such work is as productive as possible”; and that “there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job

¹⁴² Above, para 2.

¹⁴³ F Maupain ‘The Liberalization of International Trade and the Universal Recognition of Worker’s Fundamental Rights: The New ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up’ in LA Sicilianos & M Gavouneli (eds) *Scientific and Technological Development and Human Rights* (2001) 35 44.

¹⁴⁴ Above, 47. For a critique of the Declaration and a call for reforms of international labour rights generally, see Philip Alston, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime’ (2004) 15 *European Journal of International Law* 457 (positing that ILO Declaration may undermine the international labour regime). *Contra* F Maupain ‘Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Worker’s Rights’ (2005) 16 *European Journal International Law* 439 (assessing the impact of the ILO Declaration on fundamental rights in general and workers rights in particular and asserting that Alston’s thesis lacks a clear and coherent methodological framework). For a reply, see P Alston ‘Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda’ (2005) 16 *European Journal International Law* 467.

¹⁴⁵ ILO Employment Policy Convention No 122 adopted 9 July 1964 entry into force 9 July 1965 569 UNTS 65.

for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin”.¹⁴⁷

The ILO’s Committee of Experts on the Application of Conventions and Recommendations gives further indications of relevant matters to consider in determining whether or not a state is implementing its obligations on the right to work.¹⁴⁸ The relevant considerations, in relation to the ICESCR, include the “existence of discrimination in employment, on the grounds of political activity which neither constitutes an activity against the security of the State nor is incompatible with the requirements of the forms of the employment concerned; the existence of a penal offence of “leading a parasitic form of life”, without any express limit to the scope of that offence; the existence of model collective farm rules under which a member may terminate his membership only with the consent of the management committee; and the existence of special labour services in construction or agriculture in lieu of military service”.¹⁴⁹ These criteria are relevant in explaining and determining states’ obligations on social rights under the African human rights system.

Overall, African states have the obligation to promote a coherent and dynamic employment policy and attenuate, moderate and correct labour market trends. They must orient manpower and control recruitment and laying-off of workers. They must protect people in the workplace and ensure the right of workers to enjoy just and favourable conditions of work. They must enhance public and trade-union freedoms, since the right

¹⁴⁶ Above, art 1(1).

¹⁴⁷ See Above, art 1(2).

¹⁴⁸ Sieghart (note 7 above) 216.

¹⁴⁹ Above (citations omitted).

to work means participation by workers in the life of the enterprise, which, in turn, provides a forum for citizenship and realization of the democratic ideal.¹⁵⁰

The jurisprudence of the African Commission shows integrative and imaginative approaches in explaining the nature of states' obligations on social rights. In the *Social & Economic Rights Action Center & Anor v Nigeria*,¹⁵¹ the Commission held, *inter alia*, that “[t]he right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation”.¹⁵² Earlier, the Commission held, in *Union Interafricaine des Droits de l’Homme v Angola*,¹⁵³ that mass expulsion of certain West African nationals by the Angolan government threatens violation of certain egalitarian rights, including the right to work.¹⁵⁴ In *Pagnouille v Cameroon*,¹⁵⁵ the Commission held that a denial of reinstatement to former professional capacity, despite amnesty to that effect, constituted a violation of the right to work under the Charter. According to the Commission,

¹⁵⁰ See UN Economic & Social Council [ECOSOC] *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant* UN Doc E/1990/6/Add 14 (8 Oct 1996) available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.1990.6.Add.14.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.1990.6.Add.14.En?Opendocument) paras. 45–46 (discussing Tunisia’s efforts to implement the ICESCR).

¹⁵¹ *Social & Economic Rights Action Centre & Anor v Nigeria* Comm No 155/96 2001–2002 African Annual Activity Report Annex V [hereinafter *SERAC* case].

¹⁵² Above, paras 65–66.

¹⁵³ *Union Interafricaine des Droits de l’Homme v Angola* Comm No 159/96 (2000) AHRLR 18 (ACHPR 1997) reprinted in Eleventh Annual Activity Report of the African Commission 1997–1998 Annex II.

¹⁵⁴ Above, at para. 17.

¹⁵⁵ *Pagnouille v Cameroon* Comm No 39/90 (2000) AHRLR 57 (ACHPR 1997) reprinted in Tenth Annual Activity Report of the African Commission 1996–1997 Annex X.

by not reinstating Mr. Mazou in his former position after the Amnesty Law, the government has violated Article 15 of the African Charter, because it has prevented Mr. Mazou to work in his capacity of a magistrate even though others who have been condemned under similar conditions have been reinstated.¹⁵⁶

6.3.2 *Acceptance of Universal and Regional Human Rights Standards*

Majority of African states are parties to several universal human rights instruments,¹⁵⁷ including ILO instruments. To illustrate, there are 48 African ratifications of ILO Convention 87; 52 ratifications of Convention 98 on Freedom of Association and Collective Bargaining; 53 ratifications of Convention 29; 52 ratifications of Convention 105 on the Elimination of Forced and Compulsory Labour; 50 ratifications of Convention 100; 53 ratifications of Convention 111 on the Elimination of Discrimination in Respect of Employment and Occupation; 46 ratifications of Convention 138; and 49 ratifications of Convention 182 on the Abolition of Child Labour.¹⁵⁸

The widespread ratification of socio-economic rights instruments indicates a willingness on the part of governments to accept binding obligations¹⁵⁹ that will subject their policies to increasing external scrutiny. It also “suggests at least a formal

¹⁵⁶ Above, at para. 29.

¹⁵⁷ For status of ratifications of universal human rights treaties, see Office of the United Nations High Commissioner for Human Rights *Status of Ratifications of the Principal International Human Rights Treaties available at* <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf> (providing status of ratification as of 3 June 2005).

¹⁵⁸ See ILOLEX *Database of International Labour Standards available at* www.ilo.org/ilolex/english/docs/declAF.htm (last visited 13 Nov 2005).

¹⁵⁹ See Vienna Convention (note 18 above) art 14(1) (“The consent of a State to be bound by a treaty is expressed by ratification . . .”).

commitment by African States to conform their national law and practice to international standards”.¹⁶⁰

6.3.3 *Constitutionalisation of Social Rights*

The constitutionalisation of social rights—the constitutional enshrinement of rights and their protection by institutions, such as the judiciary, by way of judicial review and/or preview—has become a common feature in many African states. This may not be the only means of protecting social rights, but it is an “important mechanism for ‘mainstreaming’ respect for the values associated with these rights in the law and policy-making.”¹⁶¹ More than half of African states guarantee the right to work,¹⁶² including the rights to equal opportunity to gain a living by work which one freely chooses;¹⁶³ to a healthy and safe working environment;¹⁶⁴ to fair and equal wages;¹⁶⁵ to rest and

¹⁶⁰ C Anyangwe ‘Obligations of States Parties to the African Charter on Human and Peoples’ Rights’ (1998) 10 *African Journal International & Comparative Law* 625 626.

¹⁶¹ D Ashiagbor ‘Economic and Social Rights in the European Charter of Fundamental Rights’ (2004) *European Human Rights Law Review* 62 72.

¹⁶² See eg Alg Const sec 55; Angl Const sec 46(1); Benin Const sec 30; Burk Faso Const secs 18–19; Burundi Const sec 45; Cape Verde Const sec 60; Cent Afr Rep Const sec 9; Chad Const sec 32; Congo Const sec 24; Cote d’Ivoire Const secs 16–17; Egypt Const sec 13; Eq Guinea Const sec 25; Eth Const sec 41(1); Gabon Const sec 1(7); Ghana Const sec 24(1); Guinea Const sec 18; Libya Const sec 4; Madag Const sec 27; Malawi Const sec 29; Mali Const sec 19; Mauritania Const sec 12; Morocco Const sec 13; Mozam Const sec 88(1); Niger Const sec 25; Rwanda Const sec 30; Sao Tome & Principe Const sec 41(1); Sen Const secs 8 25; Sey Const sec 35; Tanz Const secs 11(1) 22(1); Togo Const sec 37; Uganda Const sec 14(b).

¹⁶³ See eg Cote d’Ivoire Const sec 17; Eth Const sec 41(2); Lesotho Const sec 29(1); Liber Const secs 8 18; Morocco Const sec 12; Mozam Const sec 88(2); Namib Const sec 21(1)(j); Nig Const sec 17(3)(a); Rwanda Const sec 30; Sao Tome & Principe Const sec 41(3); Sierra Leone Const sec 8(3)(a); S Afr Const sec 22; Tanz Const sec 22(2).

¹⁶⁴ See eg Angl Const sec 46(2); Cape Verde Const sec 62(1)(a); Cent Afr Rep Const sec 9; Cote d’Ivoire Const sec 19; Eth Const sec 42(2); Ghana Const sec 24(1); Guinea-Bissau Const sec 46(1); Lesotho Const sec 30(b); Liber Const sec 8; Mozam Const sec 89(2); Nig Const sec 17(3)(c); Sao Tome & Principe Const sec 42(1)(d); Sen Const sec 25; Sey Const sec 35(d); Sierra Leone Const sec 8(3)(c); Uganda Const sec 40(1)(a).

¹⁶⁵ See eg Angl Const sec 46(2); Benin Const sec 30; Burundi Const secs 45–46; Cape Verde Const sec 61(1)–(2); Chad Const sec 32; Ghana Const sec 24(1); Lesotho Const sec 30(a)(i); Liber Const sec 18; Madag Const sec 29; Malawi Const sec 31(1)(3); Mozam Const sec 89(1); Niger Const sec 25; Nig Const sec 17(3)(e); Sao Tome & Principe Const sec 42(1)(a); Sen Const sec 25; Sey Const sec 35(d); Sierra Leone Const sec 8(3)(e); Tanz Const sec 23; Togo Const sec 37; Uganda Const sec 40(1)(b).

leisure;¹⁶⁶ and to holidays with pay.¹⁶⁷ These Constitutions also guarantee to workers the right to unionise¹⁶⁸ and to strike in protection of their economic and social interests.¹⁶⁹ They protect workers against unfair dismissals¹⁷⁰ and some constitutions specifically provide protection for women during maternity.¹⁷¹ Most African constitutions also guarantee the right to social security,¹⁷² including unemployment benefits,¹⁷³ childhood and old age care,¹⁷⁴ retirement benefits and pension schemes,¹⁷⁵ sickness and incapacity

¹⁶⁶ See eg Angl Const sec 46(2); Cape Verde Const sec 62(1)(e); Cent Afr Rep Const sec 9; Congo Const sec 28; Eth Const sec 42(2); Ghana Const sec 24(2); Lesotho Const sec 30(e); Mali Const sec 19; Mozam Const sec 89(1); Nig Const sec 17(3)(b); Sao Tome & Principe Const sec 42(1)(e); Sey Const sec 35(d); Sierra Leone Const sec 8(3)(b); Uganda Const sec 40(1)(c).

¹⁶⁷ See eg Congo Const sec 28; Eth Const sec 42(2); Ghana Const sec 24(2); Lesotho Const sec 30(e); Sao Tome & Principe Const sec 42(1)(e); Sey Const sec 35(d); Uganda Const sec 40(1)(c).

¹⁶⁸ See eg Alg Const sec 56; Benin Const sec 31; Burundi Const sec 47; Cape Verde Const sec 63(1); Cent Afr Rep Const sec 10; Congo Const sec 25; Cote d'Ivoire Const sec 18; Djib Const sec 15; Eth Const sec 42(1)(a); Ghana Const sec 24(3); Guinea Const sec 18; Guinea-Bissau Const sec 45(1); Lesotho Const sec 31; Madag Const sec 31; Malawi Const sec 31(2); Mali Const sec 20; Mozam Const sec 90(1); Namib Const sec 21(1)(e); Niger Const sec 26; Rwanda Const sec 31; Sao Tome & Principe Const sec 42(1)(b); Sen Const sec 25; Sey Const sec 35(g); S Afr Const sec 23(2)(a); Togo Const sec 39; Uganda Const sec 40(3)(a).

¹⁶⁹ See eg Alg Const sec 57; Benin Const sec 31; Burundi Const sec 47; Cape Verde Const sec 66; Cent Afr Rep Const sec 10; Congo Const sec 25; Cote d'Ivoire Const sec 18; Djib Const sec 15; Eth Const sec 42(1)(b); Guinea Const sec 18; Madag Const sec 33; Malawi Const sec 31(4); Mali Const sec 21; Mauritania Const sec 14; Morocco Const sec 14; Mozam Const sec 91(1); Namib Const sec 21(1)(f); Niger Const sec 26; Rwanda Const sec 32; Sao Tome & Principe Const sec 42(1)(f); Sen Const sec 25; Sey Const sec 25(g); S Afr Const sec 23(2)(c); Togo Const sec 39; Uganda Const sec 40(3)(c) (providing, in general, that the right to strike shall be exercised within the framework of the law and that the law may limit its exercise in the interest of national defence and security, or for services and public activities or vital interest to the community).

¹⁷⁰ See eg Cape Verde Const sec 62(2)–(3); Guinea-Bissau Const sec 46(2); Mozam Const sec 89(3).

¹⁷¹ See eg Lesotho Const sec 30(d); Uganda Const sec 40(4).

¹⁷² See eg Burk Faso Const sec 18; Cape Verde Const secs 62(1)(d) 69; Chad Const sec 40; Egypt Const secs 16–17; Eri Const sec 21(2); Eth Const sec 90; Madag Const sec 30; Malawi Const sec 13; Nig Const secs 16(2)(d) 17(3)(g); Sey Const sec 37.

¹⁷³ See eg Alg Const sec 59; Cape Verde Const sec 69(1); Egypt Const sec 17; Sey Const sec 37; S Afr Const sec 27(1)(c).

¹⁷⁴ See eg Angl Const sec 47(1); Benin Const sec 26; Burk Faso Const sec 18; Cape Verde Const sec 69(1); Chad Const sec 40; Congo Const secs 30 33; Cote d'Ivoire Const sec 6; Egypt Const sec 17; Malawi Const sec 13; Nig Const secs 16(2)(d) 17(3)(f); Sey Const secs 29(c) 36; Sierra Leone Const sec 8(3)(f); Tanz Const sec 11(1); Togo Const sec 33; Uganda Const VII sec 34(7).

¹⁷⁵ See eg Egypt Const sec 17; Guinea-Bissau Const sec 46(3); Lesotho Const sec 30(a); Nig Const sec 16(2)(d).

or disability protections,¹⁷⁶ medical and health care,¹⁷⁷ and widowhood and orphan hood protection.¹⁷⁸ All national constitutions—with the exceptions of DR Congo, Libya, and Somalia—guarantee the right to freedom of association.¹⁷⁹

These constitutions obligate states to create conditions that render effective the enjoyment of social rights. For example, the Constitution of Eritrea urges the country's National Assembly to “enact laws guaranteeing and securing the social welfare of citizens, the rights and conditions of labour and other rights and responsibilities.”¹⁸⁰ Others urge governments, *inter alia*, to achieve and maintain a high and stable level of employment and to provide technical and vocational guidance and training programmes.¹⁸¹ Still, others urge governments to “[g]uarantee the existence and efficient functioning of a national system of social security, with participation of contributors” and to support, motivate, regulate, and supervise private systems of social security.¹⁸² The Constitution of Seychelles is emblematic of these types of obligations. It urges the state, *inter alia*,

¹⁷⁶ See eg Angl Const secs 47(1) 48; Benin Const sec 26; Cape Verde Const sec 69(1); Guinea-Bissau Const sec 46(3); Mozam Const sec 95(1); Nig Const sec 16(2)(d); Sierra Leone Const sec 8(3)(f); Tanz Const sec 11(1); Togo Const sec 33.

¹⁷⁷ See eg Angl Const sec 47(1); Congo Const sec 30; Egypt Const secs 16–17; Libya Const sec 15; Malawi Const sec 13; Uganda Const sec 20.

¹⁷⁸ See eg Sao Tome & Principe Const sec 43(1).

¹⁷⁹ *Human Rights Law in Africa* (note 8 above) 856.

¹⁸⁰ Eri Const sec 21(5).

¹⁸¹ Lesotho Const sec 29(2). See also Burk Faso Const sec 20 (“The state sees to the constant amelioration of conditions of work and to the protection of the worker.”).

¹⁸² Cape Verde Const sec 69(2). See also Mozam Const sec 95(2) (urging the Government of Mozambique to “promote and encourage the creation of conditions for achieving [social security]”).

- a) to take necessary measures to achieve and maintain a high and stable level of employment, as is practicable, with a view to attaining full employment;
- b) . . . to protect effectively the right of a citizen to earn a dignified living . . .;
- c) to promote vocational guidance and training;
- d) to make and enforce statutory provisions for safe, healthy and fair conditions of work . . . ;
- e) to promote machinery for voluntary negotiations between employers and workers or their organisations with a view to the regulation of conditions of employment by means of collective agreements;
- f) to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitrations for the settlement of labour disputes; [and]
- g) . . . to ensure the right of workers to organise trade unions and to guarantee the right to strike.¹⁸³

Many African states have also enacted labour legislations which, *inter alia*, define the rights of unions and professional associations; establish procedures for the creation, coalition, federation, and disbanding of trade unions; define permissible areas of activities for workers; and regulate collective bargaining processes. The post-apartheid South Africa has been particularly forceful in adopting legislative measures on social rights, understandably because it “inherited from apartheid conditions of extreme poverty and inequality accompanied by high levels of unemployment, a highly skewed income

¹⁸³ Sey Const sec 35.

pattern, low wages and a severe lack of skills among the African population”.¹⁸⁴ The Labour Relations Act;¹⁸⁵ Basic Conditions of Employment Act (BCEA);¹⁸⁶ Employment Equity Act;¹⁸⁷ and Unemployment Insurance Act¹⁸⁸ are some of South Africa’s new legal standards on labour and social security. The Labour Relations Act seeks to strike a balance between the demand of international competitiveness and the protection of labour rights. It promotes collective bargaining as the preferred method of labour relations and sets terms and conditions of employment. The BCEA, on its part, seeks to balance the protection of rights of employees against the demands of higher productivity, improved efficiency, and the promotion of flexibility. It extends employment, work, and income securities to unorganised and vulnerable workers by setting floor minimum rights covering workplace issues—hours of work, overtime, leave, termination, health, *et cetera*.

Civil courts provide remedies for human rights violations in Africa, but many states additionally establish arbitration agencies and policy-making institutions of social security and other institutions to promote and defend interests of workers.

¹⁸⁴ C Cooper ‘Globalisation, Labour Law and Unemployment: The South African Case’ in M Biagi (ed) *Job Creation and Labour Law: From Protection to Pro-action* (2000) 233 233.

¹⁸⁵ See Labour Relations Act 66 of 1995 (as amended by the Labour Relations Amendment Act 12 of 2002).

¹⁸⁶ See Basic Conditions of Employment Act 75 of 1997 (as amended by the Basic Conditions of Employment Amendment Act 11 of 2002).

¹⁸⁷ See Employment Equity Act 55 of 1998.

¹⁸⁸ See Unemployment Insurance Act 63 of 2001. See also *Human Rights Law in Africa* (note 8 above) 1511 (highlighting these enactments).

6.4 Africa's Scorecard on Social Rights

This segment examines Africa's scorecard in terms of practical measures adopted by states towards realising social rights and the effects of these measures on living standards of Africans. It asserts that the various schemes represent, in principle, steps towards fulfilling states' obligations to respect, protect, promote, and fulfil the rights to work and social security, though their effects are yet to be felt in a number of places. The reasons for the dissonance between promise and performance are varied, but they include the neo-liberal economic reforms in Africa, globalisation pressures, and authoritarianism leading to anti-labour policies.

5.4.1 *Progressive Realization Policies and Programs*

African states have actively been involved in elaborating and adopting soft norms, including resolutions and declarations of the UN aimed at poverty reduction and its eventual eradication. The Millennium Declaration, adopted during the Millennium Summit of September 2000, and Millennium Development Goals (MDGs) are examples of such soft norms.¹⁸⁹ The Millennium Declaration commits UN Member States “[t]o promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable”.¹⁹⁰ The MDGs represent the standard for identifying and measuring global development objectives in the period up to 2015.¹⁹¹ It calls for international cooperation to eradicate

¹⁸⁹ UN Millennium Declaration GA Res 55/2 UN Doc A/Res/55/2 (18 Sept 2000) [hereinafter Millennium Declaration]; Millennium Development Goals available at <http://www.un.org/millenniumgoals/> [hereinafter MDGs].

¹⁹⁰ Millennium Declaration (note 189 above) para 20.

¹⁹¹ MDGs (note 189 above).

extreme poverty and hunger; achieve universal primary education; promote gender equality and empowerment of women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria, and other diseases; ensure environmental sustainability; and develop a global partnership for development.¹⁹² Attaining these lofty goals is expected to lead to a more peaceful, just, and prosperous world.

Since employment generation remains “possibly the most pressing problem in Africa”,¹⁹³ many African governments have, in response to their constitutional and other legal order,¹⁹⁴ launched a wide range of public works programmes aimed at reducing poverty. In Ghana, youths are employed in afforestation and urban sanitation programmes.¹⁹⁵ Kenya has also launched a poverty reduction strategy outlined in the short-term Poverty Reduction Strategy Paper and the long-term National Poverty Eradication Plan.¹⁹⁶ The strategy seeks to reduce the incidence of poverty by 50 percent by 2015; empower the poor to earn income; reduce most major forms of inequalities; and increase productivity through human capital development, by investing in education and health.¹⁹⁷

¹⁹² Above.

¹⁹³ UN Economic & Social Council [ECOSOC] *Economic Report on Africa 2004: Unlocking Africa's Potential in the Global Economy* 14 para 32 UN Doc E/2004/17 (July 2004) [hereinafter *ECOSOC Economic Report on Africa 2004*].

¹⁹⁴ See eg Eth Const sec 41(6) (urging the government to “expand job opportunities for the unemployed and the poor” and, in particular, to undertake programs and public works projects).

¹⁹⁵ See K Nwuke ‘Youth Employment Summit, Economic Commission for Africa’ *Youth Employment in Africa* (2002).

¹⁹⁶ See Ministry of Finance and Planning Government of Kenya *Interim Poverty Reduction Strategy Paper* (2000).

¹⁹⁷ See above, paras 5.1–7.2.

Mozambique also launched its 1999 Plan of Action for the Reduction of Absolute Poverty for the period 2000–2004.¹⁹⁸ The plan sought to fight poverty by addressing the political, economic, social, and cultural factors that have bearing on poverty.¹⁹⁹ Under the plan, the government commits itself to launching programmes and projects at the national, provincial, and district levels, in line with its development goals.²⁰⁰ It also commits itself to addressing the country’s population growth rate and food security.²⁰¹ In January 2002, Tunisia undertook a range of measures to tackle unemployment by launching, *inter alia*, the National Employment Fund (also known as the “21-21 Fund”).²⁰² The aim of the Fund is to “facilitate[e] the integration of job seekers, particularly the young, into the labour market”.²⁰³

There are also few motions at the continental level. In September 2004, the AU Assembly convened an Extraordinary Summit on Employment and Poverty Alleviation in Ouagadougou in Burkina. The summit focused, *inter alia*, on how to empower Africans, open opportunities, and create social protection and security for workers through building a people-oriented environment for development and national growth based mobilisation of resources for implementation of adopted plans of action.²⁰⁴ The summit is expected to produce a Plan of Action leading to successive Declarations and Plans of Action against

¹⁹⁸ G Saitoti *The Challenges of Economic and Institutional Reforms in Africa* (2002) 85; Republic of Mozambique *Interim Poverty Reduction and Strategy Paper* (2000).

¹⁹⁹ See above, 85.

²⁰⁰ See above.

²⁰¹ Above.

²⁰² ECOSOC *Economic Report on Africa 2004* (note 193 above) 15.

²⁰³ Above.

²⁰⁴ For reports on the summit, see the AU website.

poverty, increasing unemployment and decreasing under-employment.²⁰⁵ These are commendable initiatives, but more action is needed to translate preaching into practice.

5.4.2 *More Aspiration than Actuality*

In 1990, the Assembly of Heads of State and Government of the then-OAU took stock of the political and socio-economic situation in Africa and concluded that the situation was “precarious”, despite many efforts deployed by its Member States to move the continent forward.²⁰⁶ Among other things, the Assembly found: “There has been [a] sharp decline in the quality of life in our countries as spending on public health, housing and education and other social services had to be severely curtailed. Food production has also fallen, in promotion [sic] to the expanding population”.²⁰⁷ Seventeen years after this Declaration, it is unclear if much has changed.

Africa appears to be on the path of sustainable development even if, as the evidence shows, that path is a zigzag: one step forward, two steps backward. Africa achieved a Gross Domestic Product (GDP) growth of 4.6 percent in 2004²⁰⁸—the highest in almost a decade. The continent’s economy is expected to remain “solidly above 5 per cent” in

²⁰⁵ Earlier continental efforts include the OAU, Declaration of the Twenty-Seventh Ordinary Session of the Assembly of Heads of State and Government on Employment in Africa OAU Doc AHG/Decl1 (XXVII) (1991) and the African Common Position on Human and Social Development in Africa, partially adopted by the OAU in its Declaration on Social Development OAU Doc AHG/Decl5 (XXX) (1994).

²⁰⁶ OAU *Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World* OAU Doc AHG/Decl1 (XXVI) (July 1990) para 5 (addressing the threat of the “marginalisation” of Africa in light of the progress of Eastern and Western Europe and the Americas in the 1990’s).

²⁰⁷ Above, para 6.

²⁰⁸ See Economic Commission for Africa (ECA) *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (2005) 34 [hereinafter ERA 2005] (attributing the growth to governments’ improved economic management, better performance of the agricultural sector and more stable political conditions in many countries).

2006, with the least developed countries (LDCs) “faring even better.”²⁰⁹ Strangely, these seemingly positive developments have not broken the cycles of unemployment and poverty in Africa. Available evidence shows that Africa is unlikely to eliminate absolute poverty by 2015.²¹⁰ There is a wide gap between the employed and the unemployed though employable, and between those who have and those who suffer.

Average unemployment rates in Africa have remained at around 10 percent since 1995, the second highest in the world after the Middle East.²¹¹ A 2004 ILO Report similarly indicates that sub-Saharan Africa “has neither reduced its unemployment rate nor improved its high incidence of working poverty”.²¹² The most visible consequence of growing unemployment is growing poverty; the majority of citizens still lack elementary capabilities—“to be adequately nourished, to be comfortably clothed, to avoid escapable morbidity and preventable mortality.”²¹³ According to the ECA Report, at least 61 million more Africans go hungry today than in 1990.²¹⁴ Africa’s poverty is the highest among all regions;²¹⁵ and it is “pervasive, intensive, chronic, gender-biased”.²¹⁶ Women

²⁰⁹ See UN *World Economic Situation and Prospects 2006* (2006) iii [hereinafter *World Economy 2006*] available at <http://www.un.org/esa/policy/wess/wesp2006files/wesp2006.pdf>.

²¹⁰ See eg World Bank *Global Economic Prospects 2004: Realizing the Development Promise of the Doha Agenda* (2003) 43 (concluding that even if Sub-Saharan Africa were to achieve a projected growth rate of 1.6 percent per capita, it would still be at the low end of the developing-country growth spectrum, “inadequate to make much of a dent in poverty and other MDGs”).

²¹¹ See ERA 2005 (note 208 above) 61.

²¹² ILO *Global Employment Trends* (2004) 3 available at <http://www.ilo.org/public/english/employment/strat/download/trends.pdf>.

²¹³ Dreze & Sen ‘Public Action for Social Security’ (note 82 above) 8.

²¹⁴ See ERA 2005 (note 208 above) xiii.

²¹⁵ See above, 91.

²¹⁶ Above, 93.

are particularly vulnerable because existing social norms limit their access to and control of productive assets.²¹⁷

Even for majority of Africans who are in employment, their “take home” pay hardly takes them home due to the slave wages they earn! The national minimum wage in Nigeria is ₦5,500 per month,²¹⁸ that is the equivalent of US \$42.8,²¹⁹ hardly enough to maintain a household pet for three days in Western countries. Nigeria’s external reserves have increased tremendously in recent years, due to the political ferment in the Middle East and consequent rise in oil prices across the globe, but it is as if the more the external reserves increase, the more poverty increases. In South Africa, the income distribution is highly skewed because of the slave wages being paid to black Africans. The bottom 20 percent of income earners in South Africa earn 1.5 percent of the national income, while the top 10 percent of income earners earn 50 percent of the national income.²²⁰

The negative impact of HIV/AIDS on labour markets compounds Africa’s predicament. According to the ECA: “Young people who are HIV-positive eventually become ill with HIV-related diseases, increasing their absence from work, reducing their productivity and lowering their chances of employment”.²²¹ The continuing “brain drain” compounds the problem. Thousands of Africans migrate to Western countries yearly in search of jobs, food, and freedom, at huge cost to Africa’s human resources and cultural

²¹⁷ See above.

²¹⁸ See National Minimum Wage (Amendment) Act No 1 (2000) sec 2 (Nig) *available at* <http://www.nigeria-law.org/LFN-2000.htm> (providing, “as from the commencement of this Act, it shall be the duty of every employer (except as provided for under this Act) to pay a wage not less than National Minimum Wage of ₦5,500.00 per month to every worker under his establishment”).

²¹⁹ Based on the international exchange rate as at 23 Mar 2006.

²²⁰ See Cooper (note 184 above) 233.

²²¹ See ERA 2005 (note 208 above) 176.

identity.²²² The crisis of brain drain is grave enough to justify the declaration of a state of intellectual emergency in Africa, a view that Sankore reinforces:

If a key factor for anticipating the future development and productivity of any modern society is the number of intellectuals, thinkers, visionaries, professionals and skilled workers it produces, then Africa had better beware. The problem is not that the continent cannot produce highly trained and skilled human resources, the problem is that today they are being taken away faster than Africa can replenish them.²²³

Africa's low scorecard on employment generation and social security is due to a combination of external and internal factors, some of which are further examined below.

1. Neo-liberal Economic Reforms

Since the late 1980s and in breach of their treaty obligations,²²⁴ Africa's Governments have abandoned the objectives of full employment for their citizens in favour of economic systems that provided for permanent pools of unemployment. They did so when they adopted multiple survival mechanisms, which included surrendering decision-making autonomy to Western IFIs—the IMF and World Bank. These IFIs subsequently

²²² Yaounde Declaration (Africa: Preparing for the 21st Century) AHG Decl 3 OAU AHG/Res 247-257 (XXXII) (July 1996) [hereinafter Yaounde Declaration] para 6 (lamenting the “real brain-drain which, each year, strips Africa of tens of thousands of its sons and daughters, professors, scientists and other highly qualified human resources, which escape to the North as the continent progressively loses its cultural identity in the face of dominant foreign cultures”).

²²³ Cf R Sankore ‘Africa: Killing Us Softly’ *New African* Nov 2005 9.

imposed Structural Adjustment Programs (SAPs) purportedly to deal with Africa's economic fragility and non-response to previous development strategies. The reforms were aimed at stabilizing Africa's external and internal balances, thereby promoting their growth.²²⁵ Under SAPs, African countries were required, *inter alia*, to liberalise their trade sector and eliminate distortions in price; devalue their currencies and remove government subsidies; reduce budget deficit and the size of the public sector; and privatise governmental parastatals.²²⁶ Such interventions were justified on the ideological but illogical grounds of economic neo-liberalism or what has come to be known as "the Washington Consensus"—the notion that market forces, not governments, should regulate the global economy.²²⁷ SAPs made the implementation of such policies a precondition for debt re-scheduling, new loan facilities, and other concessions.²²⁸

SAPs were flawed by a lack of distributional analysis and by poor sequencing of reforms, notably premature financial liberalisation.²²⁹ The IMF sought to apply the same prescriptions across board, notwithstanding that the march of Africans into the world economy does not follow a strait line. Non-capitalist modes of production are still norms in Africa and national financial, banking and monetary systems are quite unsophisticated, not to mention transportation and communications infrastructure, which, already weak,

²²⁴ "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character." GA Res 56/83 at 4 UN Doc A/RES/56/83 (28 Jan 2002).

²²⁵ P Engberg-Pedersen *et al* (eds) *Limits of Adjustment in Africa: The Effects of Economic Liberalization, 1986–94* (1996) ix.

²²⁶ See above, 7.

²²⁷ R Falk *Predatory Globalization: A Critique* (1999) 1.

²²⁸ See *Limits of Adjustment in Africa* (note 225 above) ix.

²²⁹ For a critique, see P Collier & JW Gunning 'The IMF's Role in Structural Adjustment' (1999) 109 *Economics Journal* 634.

have disintegrated in many states.²³⁰ SAPs “provided only a partial solution [and] promoted reforms that tended to remove serious price distortions, but gave inadequate attention to the provision of social services. Consequently, only a few countries managed to achieve sustainable higher growth under these programmes”.²³¹

“Regardless of the merits of policies of trade liberalization”, says the UN Economic and Social Council, “the fact remains that in many African countries the reduction of tariff and non-tariff barriers has been associated with a sharp fall in employment, as consumers have switched from non-traded goods to imports”.²³² SAPs, in particular, further deprived already impoverished Africans—many of who were already working for the equivalent of slave labour wages—and subjected the population to the whims and caprices of private entrepreneurs.²³³ SAPs reinforced authoritarianism in Africa, as most governments were intolerant of opposition to adjustment measures, like Babangida’s Nigeria.²³⁴ Even Ghana, the IMF’s showpiece of adjustment in Africa, repressed demands of significant sections of civil societies.²³⁵

Many public servants were retrenched during the periods under review because achieving macroeconomic balance required reducing the budget deficit, which in turn

²³⁰ See TM Callaghy ‘The State and the Development of Capitalism in Africa: Theoretical, Historical, and Comparative Reflections’ in D Rothchild & N Chazan (eds) *The Precarious Balance: State & Society in Africa* (1988) [hereinafter *The Precarious Balance*] 67 78 (arguing that Africa is unlikely to become significantly capitalist in the near future given that the factors that could facilitate its development remain weak or nonexistent). Above.

²³¹ New Partnership for Africa’s Development (NEPAD) (2001) para 24.

²³² ECOSOC *Economic Report on Africa 2004* (note 193 above) 14 para 32.

²³³ See, in general, DD Bradlow ‘The World Bank, the IMF, and Human Rights’ (1996) 6 *Transnational Law & Contemporary Problems* 47 56; B Rajagopal ‘Crossing the Rubicon: Synthesizing the Soft International Law of the IMF and Human Rights’ (1993) 11 *Boston University International Law Journal* 81 90 95–96.

²³⁴ E McCarthy-Arnolds et al (eds) *Africa, Human Rights, and the Global System: The Political Economy of Human Rights in a Changing World* (1994) 147–52.

required downsizing the civil service system.²³⁶ Ghana reportedly retrenched 10,500 civil servants in 1987, 11,000 in 1988, and 12,000 in 1989.²³⁷ Of an estimated 320,000 employees of approximately 200 state-owned enterprises, at least 39,800 were redeployed between 1988 and 1989²³⁸—a sizeable proportion of those affected were women.²³⁹ In some countries, retrenched workers suffered long-lived and deep losses of income. In Guinea, researchers found that the average unemployment duration of public-sector workers that were laid off between 1985 and 1988 exceeded two years and thirty percent were still unemployed in 1992.²⁴⁰

Africa has not quite learned from these bitter lessons of history, as Bretton Woods' institutions continue to bulldoze their way and impose their will on the continent, “without outsiders asking too many questions”.²⁴¹ Many states are embarking on fresh rounds of market-centred economic reforms, which “equate[...] development primarily with economic growth by giving the private sector maximum freedom as the engine of growth,” and “growth is often measured to exclude attainment of social objectives like

²³⁵ See, in general, T Mkandawire & A Olukoshi (eds) *Between Liberalisation and Oppression: The Politics of Structural Adjustment in Africa* (1995) (analyzing the social, cultural, and political effects of African structural adjustment programs).

²³⁶ See, in general, J Healey & M Robinson *The Design of Economic Reforms in the Context of Political Liberalization* (1995). See also Bradlow (note 233 above) 69; Rajagopal (note 233 above) 90.

²³⁷ ILO *From Redeployment to Sustained Employment Generation: Challenges for Ghana's Programme of Economic Recovery and Development* (1989) 35.

²³⁸ Above, 37.

²³⁹ T Manuh ‘Ghana: Women in the Public and Informal Sectors under the Economic Recovery Programme’ in P Sparr (ed) *Mortgaging Women's Lives: Feminist Critiques of Structural Adjustment* (1994) 61 68.

²⁴⁰ N McCulloch *et al Trade Liberalization and Poverty: A Handbook* (2001) 147.

²⁴¹ J Stiglitz ‘The Insider: What I Learned at the World Economic Crisis’ *The New Republic* 17 Apr 2000 at 57 (noting that the IMF “rarely allows sufficient time for broad consensus-building or even widespread consultations” in its ‘negotiations’ with receiver nations). See Rajagopal (note 233 above) 87 (“The Articles of Agreement of the IMF . . . were concluded at the Bretton Woods Conference in July 1944.”).

[work, social security,] education and health.”²⁴² Privatisation, commercialisation, downsizing, outsourcing, mergers and acquisitions, these and other emergent economic jargons have the hallmarks of earlier reform processes: new massive job losses, with consequent increase in spatial and temporal poverty of citizens. As Gathii explains, “by allocating resources away from supporting social services, market-centered development postulates that economic growth will follow since resources will be allocated to the most efficient members of a society—the captains of industry”.²⁴³

It is clear that Africa’s governments are sailing by dead reckoning, as results cannot be checked by facts. At best, these new rounds of reforms “protect elites more than the lower rungs of the state apparatus”²⁴⁴ and enable Africa’s leaders to recentralise power and intensify the presidential tendencies of their regimes. The bleak situation is compounded by governments’ failure to put in place viable programs to cushion the effects of their phoney reforms.²⁴⁵ Governments merely preach to citizens to wait and hope for better days.²⁴⁶

Most Western countries, including China, have made considerable improvements in their social security systems; “social security [including social assistance and unemployment benefits] expenditure as a percentage of GDP has risen” in the last

²⁴² J Gathii ‘A Critical Appraisal of the NEPAD Agenda in Light of Africa’s Place in the World Trade Regime in an Era of Market Centered Development’ (2003) 13 *Transnational Law & Contemporary Problems* 179 183 187.

²⁴³ Above, 187.

²⁴⁴ See NV de Walle *African Economies and the Politics of Permanent Crisis, 1979–1999* (2001) 275.

²⁴⁵ See ERA 2005 (note 208 above) 92 (stating that only “very few [African] countries provide specific measures to counter the adverse employment effects of globalization, liberalization and privatization”).

²⁴⁶ See Yaounde Declaration (note 222 above) para 7.

decade.²⁴⁷ In 1990, social security expenditure expressed as a percentage of GDP was between twenty and thirty percent in most European countries.²⁴⁸ In Africa, “protection against the risk of unemployment is non-existent and there is little or no social assistance”.²⁴⁹

Globalisation and the lopsided implementation of free trade have further complicated the feeble attempts of African states to realise social rights. The rapid dismantling of trade protection, deregulation of the capital and financial market, outsourcing of work,²⁵⁰ relocation of plants, and technological and other developments have brought adverse economic and social consequences in many countries. The liberalisation of the market has allowed cheaper imports to flood Africa, leading to many job losses especially in industries such as clothing and textiles. In order to stay competitive, local industries have downsized their export sector and introduced labour saving technologies. Massive retrenchment has ensued and those affected have often been left in the cold particularly as there are no comprehensive and effective social insurance schemes in Africa.²⁵¹ Motivated by market-oriented economic doctrine and a perception of unions as being

²⁴⁷ ILO *World Labour Report 2000* (note 86 above) 51; ‘China’s Social Security System Framework Takes Shape’ *People’s Daily* 14 Sept 2004 available at http://english.people.com.cn/200409/14/eng20040914_156987.html.

²⁴⁸ ILO *World Labour Report 2000* (note 86 above) 56.

²⁴⁹ Above, 53.

²⁵⁰ About 68 percent of companies surveyed in South Africa outsourced labour during 1994-98, with the majority of them coming from the blue-collar sector. See Cooper (note 184 above) 235 (referencing J Kelly ‘The Wage Settlement Survey’ *Quarterly Report* Mar 1999).

²⁵¹ See above.

obstructive to economic efficiency, many states have enacted labour laws that are incompatible with ILO standards.²⁵²

2. Authoritarianism and Anti-labour Policies

Anti-labour and anti-workers legislation still exists and persists in many parts of Africa. Some of these legislations were enacted during the era of authoritarianism and totalitarianism in Africa, but they still govern Africans from their graves, long after the enacting regimes have gone. In other countries, existing constitutional provisions on the right to work have been weakened or significantly changed. Nigeria's controversial Labour Bill, which sought to amend the Trade Union Act of 1990—resulting in a 2005 Amendment—is emblematic of the emerging anti-unionism in Africa.²⁵³ The Bill gives the Nigerian Minister of Labour exclusive power to decide which trade union should be registered and who should belong to such a union.²⁵⁴ It bars workers in certain sectors of the economy—aviation, health, electricity, and even education—from engaging in strike actions.²⁵⁵ It replaces labour centres with federating units.²⁵⁶ Government apologists see the bill as aiming at democratising and strengthening labour in Nigeria and enhancing

²⁵² See, in general, G Biffl & J Isaac 'How Effective are the ILO's Labour Standards Under Globalisation?' Paper presented at the IIRA/CIRA 4th Regional Congress of the Americas Centre for Industrial Relations, University of Toronto (25–29 June 2002) available at http://www.cira-acri.ca/IIRA_CIRA_docs/Isaac_and_Biffl.pdf.

²⁵³ Trade Union (Amendment) Act (2005) (Nigeria) available at [http://www.nigeria-law.org/TradeUnion\(Amendment\)Act2005.htm](http://www.nigeria-law.org/TradeUnion(Amendment)Act2005.htm). For commentary on the legislation, see S Olukoya Modified, 'A Union Bill Still Gives Cause for Concern' *Asheville Global Report* 16-22 Sept 2004 available at <http://www.agrnews.org/issues/296/labor.html#3>.

²⁵⁴ Trade Union (Amendment) Act (2005) (note 253 above) art 8.

²⁵⁵ See above art 6(6).

²⁵⁶ See above art 7(2).

fundamental choices for workers.²⁵⁷ However, the Nigerian Labour Congress (NLC) believes that the bill would do violence to the freedom of workers. The Bill, says the NLC President, “is vindictive, punitive and calculated to destroy the labour movement”.²⁵⁸

Notwithstanding the trumpets of democratisation that seemingly blow across Africa, authoritarianism and personalisation of power is still the norm. Authoritarianism makes the realisation of human, including social, rights difficult, if not utterly impossible. There is generally a curious double feeling of trust and distrust between states and their judicial institutions. The independence of the judiciary has been seriously eroded in many states, due to executive and legislative lawlessness. The weakening of judicial institutions—often through inadequate funding, understaffing, and poor training of judicial personnel—undermines efforts to check abuses of state power. The African Commission confirms that many governments deliberately work to weaken domestic courts, thereby hampering the smooth administration of justice.²⁵⁹

President Robert Mugabe of Zimbabwe frequently uses constitutional amendments to reverse unwelcome Supreme Court decisions and weaken constitutionally guaranteed rights and the rule of law.²⁶⁰ In Nigeria, some judges have been pressurised to recant after giving unequivocal orders. In March 2006, Justice Goodluck of the Abuja High Court recanted two days after giving a clear interim order, “protesting that what was indubitably

²⁵⁷ See JA Ogbodo ‘Reps Split Over Labour Bill’ *Guardian News* available at <http://www.guardiannewsngr.com/news/article01/080904>.

²⁵⁸ ‘Labour Bill: Govt, NLC Trade Words’ *This Day* [Nig] 26 Aug 2004 available at <http://news.biafranigeriaworld.com/archive/2004/aug/26/004.html>.

²⁵⁹ See *CLO v Nigeria* (note 78 above) para 14.

an order was an obiter dictum”.²⁶¹ On 12 January 2006, Justice Yusuf of the Oyo State High Court declared the constitution of a seven-man impeachment panel as illegal but later withdraws from the case, “willy-nilly, without adducing reasons for her decision to do so”.²⁶² All of this is “a metaphor for the depth to which a section of the Judiciary has sunk, in a democratic dispensation”.²⁶³ To protest the serial disobedience of court orders by the Obasanjo Administration, the Nigerian Bar Association (NBA)—the umbrella body for lawyers—embarked on a two-day landmark boycott of courts throughout the country in March 2006.²⁶⁴ The boycott was “the first time in a democracy and the second time in the history of Nigeria”.²⁶⁵

The present writer submits that a government that chooses which section of the law to respect and that routinely violates the constitution and court rulings lacks the moral strength to insist on either due process or the rule of law. Justice Brandeis of the US Supreme Court underscored the point more elegantly in *Olmstead v. United States*,²⁶⁶ when he declared:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. ... For good or ill, it teaches the whole people by its

²⁶⁰ Lord Lester ‘The Challenge of Bangalore: Making Human Rights a Practical Reality’ in (1999) 4 *European Human Rights Law Review* 273 277.

²⁶¹ See Editorial: ‘Conflicts and Intrigues in the Realm’ *The Guardian* [Nig] 21 Mar 2006.

²⁶² Above.

²⁶³ Above (noting that the development is “a dangerous erosion of the independence of th[e judicial] arm of government”).

²⁶⁴ See Editorial: ‘NBA Boycott of Courts’ *Daily Champion* [Nig] 17 Mar 2006 available at <http://allafrica.com/stories/200603170170.html> (reporting that the NBA stayed away from courts across the nation “to protest the non-adherence to the rule of law by all tiers of government”).

²⁶⁵ Above.

example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.²⁶⁷

6.5 Options for Realising Social Rights in Africa

Realising social rights in many African countries remains largely a fiction, more aspiration than actuality. Poverty still defines most of Africa. Oddly, Africa's poverty has occurred in the context of a seemingly positive economic growth.²⁶⁸ The reason for this anomaly is that most countries view development solely as the growth of GDP or the promotion of industrialisation. Yet, the real index for measuring the success of a given society is the substantive freedoms that its members enjoy rather than its GDP.²⁶⁹ "Development", says Sen, "has to be more concerned with enhancing the lives we lead and the freedoms we enjoy".²⁷⁰ Economic policies or blueprints make meaning only to the extent that they progressively help to liberate people from unemployment and misery.

The failure of Africa's seeming economic growth to reduce incidences of general and working poverty suggests that the current development mythologies and, in particular,

²⁶⁶ Cf *Olmstead v United States* 277 US 438 (1928) (Brandeis J dissenting).

²⁶⁷ Above, at 485.

²⁶⁸ See ERA 2005 (note 208 above) 92. Cf World Economy 2006 (note 209 above) ("Despite strong growth performance, many developing countries continue to face high levels of structural unemployment and underemployment which limit the impact of growth on poverty reduction.").

²⁶⁹ See Sen Development as Freedom (note 4 above) 18.

²⁷⁰ Above, 14. Cf Dreze & Sen *Public Action for Social Security* (note 82 above) 12 (The object of public action should be the enhancement of the capability of people to undertake valuable and valued "doings and beings"). The authors define a person's (formal) capability as "a set of functioning bundles, representing the various alternative 'beings and doings' that a person can achieve with his or her economic, social, and personal characteristics" but they admit that there are obvious problems in characterizing and analysing capabilities. See above. See also NJ Udombana 'A Question of Justice: The WTO, Africa, and Countermeasures for Breaches of International Trade Obligations' (2005) 38 *John Marshall Law Review*

“the nexus of growth, employment and poverty reduction” should be re-examined.²⁷¹

This segment examines the options available to Africa’s governmental, inter-governmental and non-governmental institutions towards realising social rights. It deliberately adopts a holistic approach in its prescriptions, since the diagnosis is not merely legal. Changes aimed at the effective implementation of social and other egalitarian rights will not come solely from the formal framework of the African Charter or from the Charter bodies; they will come largely from political mobilisation and community participation in campaigns to protect these rights.

6.5.1 Options for the African Union

The AU should serve as pivot and catalyst for the promotion of social rights in Africa. The AU Act has reinvigorated some of the almost moribund organs of the OAU in ways that could promote the realisation of social rights in Africa.²⁷² The AU Assembly determines the common policies of the AU and “receive[s], consider[s,] and take[s] decisions on reports and recommendations from the other organs” of the AU,” among other things.²⁷³ Another relevant organ is the Economic, Social and Cultural Council,

1153 1202 (“Life is primarily about promoting human dignity, happiness, and values; profit and GDP are means to these ends”).

²⁷¹ ERA 2005 (note 208 above) 92.

²⁷² See, in general, NJ Udombana ‘The Institutional Structure of the African Union: A Legal Analysis’ (2002) 33 *California Western International Law Journal* 69 (discussing the AU organs from an international institutional perspective).

²⁷³ Above art 9(1). Other functions include considering requests for membership; establishing AU organs; monitoring the implementation of policies and decisions and ensuring all Member States’ compliance; adopting the budget; giving directives to the Executive Council on the management of conflicts, war, and other emergency situations as well as the restoration of peace; appointing and terminating judges of the AU Court of Justice; and appointing the Chairman of the AU Commission and his or her deputy or deputies and other commissioners and determining their functions and terms of office. Above.

which is “an advisory organ composed of different social and professional groups of the Member States of the Union”.²⁷⁴

A key organ that should continually feed the AU Assembly with sound recommendations should be the AU Executive Council, which replaced the OAU Council of Ministers. The Council is “composed of the Ministers of Foreign Affairs or such other Ministers or Authorities as are designated by the Governments of Member States”.²⁷⁵ It is vested with wide variety of responsibilities, some of which are relevant to the realisation of social rights in Africa.²⁷⁶ It coordinates and makes decisions on policies in areas of common interest to the Member States. These include foreign trade; energy, industry and mineral resources; food, agricultural and animal resources, livestock production and forestry; water resources and irrigation; environmental protection, humanitarian action and disaster response and relief; and transport and communications.²⁷⁷ Other areas over which the Council has jurisdiction are insurance; education, culture, health, and human resources development; science and technology; nationality, residency, and immigration matters; social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped; and the establishment of a system of African awards, medals, and prizes.²⁷⁸

It is important for all these key organs to pay greater attention to problems of unemployment and poverty in Africa and to offer pragmatic recommendations to

²⁷⁴ Above art 22(1).

²⁷⁵ Above art 10(1).

²⁷⁶ Above art 13(1).

²⁷⁷ Above art 13(1)(a–f).

²⁷⁸ Above art 13(1)(g–l).

Member States towards ameliorating these problems. Prioritisation is imperative for the advancement of social rights. The majority of Africans, particularly the poor, has grown cynical of the various poverty reduction strategies and now adopts a “wait-and-see” attitude. Governments should not blame citizens for being cynical, given the failure of previous experiments to deliver promised and expected results. Poverty reduction and eradication require more than pious Declarations and Plans of Action. It requires even more than NEPAD, which, being donor-driven, requires massive inflows of capital as the primary pre-condition for its success. According to NEPAD agenda, Africa will require \$64 billion annually to achieve a seven percent annual growth rate. Part of this amount will come from domestic savings, assuming improved political and economic governance, but the “bulk of the needed resources will have to be obtained from outside the continent”.²⁷⁹

If the AU and its Members States want Africans to take them seriously over their poverty reduction mission, then they must look inward and take immediate and real action that will have positive effects on the standard of living of Africans. As a start, the AU should urge its Member States to establish a Social Fund aimed at improving employment opportunities in their countries. The Fund could increase the mobility of citizens and facilitate their adaptation to industrial changes, in particular through vocational training and retraining, and contribute to raising living standards. The Fund could also promote integration efforts in Africa.

²⁷⁹ Above, para 144.

The European Social Fund (ESF) has become the EU's most important instrument for combating unemployment.²⁸⁰ The ESF has the primary task of combating long-term unemployment and facilitating the entry into working life of young people and of people exposed to exclusion from the labour market and of facilitating the adaptation of workers to industrial change and to changes in production systems.²⁸¹ Since Africa did not feel embarrassed in patterning its integration agenda almost wholly on the European model, it should equally not feel embarrassed in taking precedents from programmes that have impacted positively on the EU's citizens.

The AU should take measures to facilitate the mutual recognition and acceptance of workers by Member States, including harmonising educational and vocational training manuals in Africa. Vocational training policies will promote the mobility of labour and enable workers to adapt to any negative consequences arising from integration. The AU should adopt a common policy on employment, social security and related issues to guide domestic policies and programs of Member States. Africa is still a jigsaw, with no common social and employment policies, other than general and vague objectives in some regional instruments like the AU Act and NEPAD. It is perfectly reasonable, for example, for the AU to adopt a Charter on Small and Medium Enterprises (SMEs) as a way of creating jobs and improving the living conditions of Africans. SMEs are critical factors in economic growth; they are increasingly responsible for the creation of the

²⁸⁰ Commission of the European Communities *Communication on European Social Fund Support for the European Employment Strategy* at 2 COM (2001) 16 final (23 Jan 2001).

²⁸¹ The ESF has its legal basis on European Community law, as embodied in the Single European Act of 1986, the Treaty of the European Union (EU), and the Treaty of Amsterdam. See Single European Act 17 Feb 1986 (Luxembourg) & 28 Feb 1986 (The Hague) 1987 OJ (L 169) 1; Treaty on European Union 7 Feb 1992 1992 OJ (C 191) 1 [hereinafter EU Treaty]; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts 2 Oct 1997 1997 OJ (C 340) 1.

majority of jobs throughout the world; they are potential seedbeds for technological acquisition and innovation; and they could help create an environment for innovation and entrepreneurship.

Again, the European Charter for Small Enterprises (ECSE)²⁸² could serve as a template for such a scheme in Africa. The ECSE enjoins governments to focus their strategic efforts on ten action lines, which are vital to the environment in which SMEs operate. These action lines include education and training for entrepreneurship; better legislation and regulation; taxation and financial matters; and strengthening of technological capacity of SMEs.²⁸³ Some of these lines are relevant to Africa. The suggested African Charter on SMEs should commit governments into providing incentives and equal opportunity for access to credit and foreign exchange for all SMEs. It should commit them into simplifying and decentralising business registration in order to eliminate the link between high administrative burdens and corruption; this will facilitate enterprise creation. It should, moreover, commit governments into removing constraints to the development and growth of SMEs, in line with the ILO's recommendations.²⁸⁴ The Charter should contain obligations for periodic reports by states

²⁸² European Charter for Small Enterprises (ECSE) adopted in Lisbon on 13 June 2000 and approved at the European Council in Feira held on 19–20 June 2000 *available at* http://europa.eu.int/comm/enterprise/enterprise_policy/charter/index_en.htm [hereinafter ECSE].

²⁸³ Others are cheaper and faster start-up; availability of skills; improving online access; getting more out of the single market; successful e-business models and top-class small business support; and developing stronger, more effective representation of SMEs' interests at the EU and national levels. *Id.*

²⁸⁴ ILO Job Creation in Small and Medium-Sized Enterprises Recommendation (note 121 above). Constraints in the way of SMEs could arise from a number of situations. It could arise from: difficulties of access to credit and capital markets; low levels of technical and managerial skills; inadequate information; low levels of productivity and quality; insufficient access to markets; difficulties of access to new technologies; and lack of transport and communications infrastructure. Above, para 6(2)(a–g). Constraints could also arise from inappropriate, inadequate, or overly burdensome registration, licensing, reporting, and other administrative requirements, including those which are disincentives to the hiring of personnel, without prejudicing the level of conditions of employment, effectiveness of labour inspection, or the system of supervision of working conditions and related issues. Above, para 6(2)(h). It could arise from insufficient support for

on their implementation of policies contained therein. The Pan-African Parliament (PAP), inaugurated in South Africa in 2004, could receive and consider such reports.

The AU should also adopt special policies and common strategies targeting small scale and traditional farmers in rural areas and creating enabling conditions for private sector participation. Emphasis should be on “human capacity development and the removal of constraints to agricultural production and marketing, including soil fertility, poor water management, inadequate infrastructure, pests and diseases”.²⁸⁵ The African Investment Bank, when established,²⁸⁶ should give priority to investment in agricultural production. “Technological innovation and technology diffusion [also] hold enormous potential for accelerating agricultural output and productivity”, though most African countries, let alone small-scale farmers, lack the research capacity necessary for major breakthroughs.²⁸⁷ The AU should facilitate such research,²⁸⁸ by collaborating with relevant international institutions, including the Food and Agricultural Organisation (FAO).

research and development and from difficulties in access to public and private procurement opportunities. Above, para 6(2)(i-j).

²⁸⁵ OAU Declaration on Agriculture and Food Security in Africa Assembly/AU/Decl7 (II) para 1.

²⁸⁶ See Constitutive Act of the AU adopted 11 July 2000, entry into force 26 May 2001 OAU Doc CAB/LEG/23.15 479 (2000) (as amended by the Protocol on Amendments to the Constitutive Act of the AU 11 July 2003) [hereinafter AU Act] art 19 (providing for the establishment of financial institutions, including the African Investment Bank). The rules and regulations of the Financial Institutions are to be defined in subsequent protocols. *Id.*

²⁸⁷ NEPAD (note 231 above) para 191.

²⁸⁸ AU Act (note 286 above) art 3(m) (stating, as one of the objectives of AU, the “promot[ion of] research in all fields, in particular in science and technology”).

6.5.2 *Options for Africa's Governments*

The full implementation of social rights involves internal and external elements of a state's governance.²⁸⁹ The right to work, in particular, “involves political imperatives that match or exceed those derived from other economic and social rights”.²⁹⁰ African governments must dismantle many of their domestic laws that undermine workers' rights if they expect citizens to take their avowed human rights posturing seriously. They must not inhibit voluntary unionisms that pursue worker's interests. As Fukuyama rightly maintains, “there is a natural, universal impulse towards sociability, which if blocked from expressing itself through legitimate social structures like the family or voluntary associations, appears in pathological forms like criminal gangs”.²⁹¹

Those African states that have not yet ratified relevant ILO conventions ought to do so without further delay. These conventions are vital to the enjoyment of social rights. Even states that have comprehensive legal regimes to secure these rights must implement strong, well-financed public policies to realise these goals. All states must place decent work at the heart of macroeconomic and social policies rather than treat employment as, to borrow Howse's interesting phrase, “a kind of gratification to be postponed until unrestrained industrial or postindustrial capitalism produces high real incomes”.²⁹² Fair and living wages are human rights, not acts of compassion. There is no excuse for

²⁸⁹ See NJ Udombana 'Socio-Economic Rights and the Nigerian Worker' (1999) 3 *Modern Practice Journal of Finance & Investment Law* 397 408.

²⁹⁰ RL Siegel 'The Right to Work: South Africa's Core Minimum Obligations' in *Exploring the Core Content of Socio-Economic Rights* (note 81 above) 209 (stressing, “prolonged neglect of obligations to create and secure work can shift political support from one party or leader to another and bring down national governments and political orders”). Above.

²⁹¹ F Fukuyama *Trust: The Social Virtues and the Creation of Prosperity* (1995) 337-8 (stressing that it is the suppression of legitimate associations that allows “mafias” to appear “in places like southern Italy, the American inner city, Russia, and many sub-Saharan African cities”). Above.

governments or companies to pay slave wages to workers just because many of these workers are more concerned about job security and survival. Poverty is no excuse for slavery.

Improving nationwide employment requires focusing on employability, employment creation, equity, entrepreneurship, environmental sustainability, education, and development. States must also safeguard and develop available natural and material resources for citizens' benefits. Employment generation could prevent the morbidities and mortalities that frequently afflict Africa and could be a positive part of famine prevention efforts in a number of countries. During the prolonged draught in Cape Verde in the middle of 1970s, the government and other agencies provided relief almost exclusively in the form of employment for cash wages in makeshift work. "These preventive measures", according to Dreze and Sen, "succeeded to a great extent in averting a severe famine. There were no reports of large-scale starvation deaths, and the overall increase in mortality seems to have been moderate".²⁹³

There is symmetry between education and work. Investments in education and training are fruitless in the absence of job opportunities; yet, poor people cannot maximize their potentials to lift themselves and their families out of poverty, due to lack of education. Africa's governments should not merely invest in human capital through education; they should also focus energies on creating productive and remunerative work for the poorest citizens, with conditions of freedom, security and human dignity. They should enact regulations to compel public and private employers to pay special

²⁹² R Howse 'From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 *American Journal of International Law* 94 104.

²⁹³ Dreze & Sen *Hunger and Public Action* (note 38 above) 135.

allowances to employees to reduce the impact of devaluation on employees' incomes. Such allowances should not be considered as a ratio or basis for the quantitative determination of any legal or contractual right or any right derived from a collective bargaining agreement. Argentina has adopted regulations requiring employers to provide a monthly, non-remunerative allowance in addition to employees' normal wages.²⁹⁴ The allowance is included in the basic salary, on a staggered and progressive basis, and subject to withholdings and contributions to social security. It is also included in the calculation of income taxes, vacations, bonuses, severance payments, *et cetera*.²⁹⁵

Governments should regulate the exercise of free enterprise in order to meet the demands of sustainable development and prevent the social apartheid and exclusion that inevitably accompanies the liberalisation of trade. Free enterprise may be inevitable in an age of globalisation, but “[m]arkets, free or otherwise, are not a product of nature [but] are legally constructed instruments, created by human beings hoping to produce a successful system of social ordering”.²⁹⁶ Adaptability to globalisation imperatives should be balanced against the protection and security of the labour force.²⁹⁷ Governments should curb imports to protect local production, enable farmers and pastoralists to receive fair prices for their products, and, ultimately, create jobs. Most industrialized nations offer financial and technical support to their SMEs;²⁹⁸ and many European countries, in

²⁹⁴ EC Collins ‘Labor and Employment Developments From Around the World’ (2004) 38 *International Law* 149 149.

²⁹⁵ Above, 150.

²⁹⁶ C Sunstein *Free Markets and Social Justice* (1997) 384.

²⁹⁷ See Cooper (note 184 above) 234 (arguing, “It is imperative in South Africa that whatever policies are followed address not only growth but a strategy for development which encourages job creation, and the alleviation of inequality and poverty”), above.

²⁹⁸ ECOSOC *Economic Report on Africa 2004* (note 193 above) 14 para 32.

particular Japan and Germany, jump-started their economies after World War II by deploying public money to develop infrastructure and assisting their SMEs.

It is outrageous for Africa to insist that the IFIs offer the only good economic reform ideas and that adherence to their recommendations is the most important ingredient for success. Painfully, Africa's increasing embrace of neo-liberalism does not indicate that the continent has an exit strategy. Africa must create its own development agenda, "based on the vision of what development should be and what it takes to bring it about—courage, diligence and confidence".²⁹⁹ A dogmatic adherence to the Bretton Woods' traditional but questionable prescriptions—devaluation, reduction of the public sector, and removal of price controls—will only accelerate the slide to ruin. They have proved in the past to be nothing but bumpy rides to anomie, partly because of weak political and economic infrastructures and superstructures, as Chapter Three interrogated. The Western notion of development, as Ake astutely observed,

does not encourage attention to the revolutionising of existing social relations of production as a likely or even possible stimulant of development. It does not encourage the disengagement of African economies from the exploitative structural links with Western capitalist economies. It encourages the perception of the process of development as the gradual solution of limited and technical problems within the context of the existing order. That is the sense in which the notion of development . . . limits the scale of change of African economies.³⁰⁰

²⁹⁹ A Adedeji 'Africa's Strategic Outlook' in A Adedeji (ed) *Africa Within the World: Beyond Dispossession and Dependence* (1993) 207.

³⁰⁰ C Ake *A Political Economy of Africa* (1981) 143.

Even the IMF now acknowledges that there are social dimensions of the economic reform process that have to be addressed and that “[m]itigating the adverse effects of reform programs on poor groups should be an important aspect of the IMF’s policy advice and program design”.³⁰¹ The basic policies that promote economic growth and reduce poverty include the absence of high inflation, functioning foreign exchange and financial markets, openness to foreign trade, effective rule of law, and delivery of key services such as education and health care.³⁰² What Africa needs to put in place these policies are genuine statesmanship and political will, ingredients that have hitherto been in short supply in the continent.³⁰³

6.5.3 *Options for the Civil Society*

Chapter Five of this thesis focussed exclusively on the human rights responsibilities of transnationals, but corporations are part of the whole called non-state actors. Civil Society Organizations (CSOs) have, at the minimum, moral responsibilities to promote socio-economic rights in Africa. The rise in the number of CSOs in the last few decades may be “comparable in importance with the rise of the nation state in the nineteenth century”.³⁰⁴

³⁰¹ Foreign Affairs & Policy Development and Review Departments *IMF, Review of Social Issues and Policies in IMF-Supported Programs* 27 Aug 1999 8–9.

³⁰² For an overview, see S Devarajan *et al* (eds) *Aid and Reform in Africa: Lessons From Ten Case Studies* (2001) 1–7.

³⁰³ Cf NJ Udombana ‘The Summer Has Ended and We are Not Saved! Towards a Transformative Agenda for Africa’s Development’ (2005) 7 *San Diego International Law Journal* 5 60 (“It is the lack of visionary leadership or the pursuit of an alien vision that accounts for Africa’s inability to harness its abundant human and material resources to lift its citizens out of economic scarcity”).

³⁰⁴ M Carbone ‘The Role of Non-State Actors in Development Policy: Perceptions and Changing Practices’ *Courier ACP-EU* July–Aug 2003 at 14.

Although CSOs could be multifaceted in their many guises,³⁰⁵ they are the main analytical paradigms in African politics. Their increasing popularity lies, partly, in the fact that they represent the powerless and disenfranchised in society.³⁰⁶ They are the forces for societal resistance to state excesses and are organisationally, materially, and ideologically centrepieces of the civil movements and protests for reform and change.³⁰⁷ A reinvigorated civil society certainly holds the key to social transformation in Africa, which probably explains why the AU has, as one of its visions, building “a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among [African] peoples”.³⁰⁸

NGOs, in particular, have made tremendous contributions to the development of human rights in Africa, often at huge human and material costs. They have given human rights issues both attention and notoriety, from lobbying governments and powerful groups to advocacy campaigns. In the past, majority of NGOs were preoccupied with civil and political rights, paying only lip service to socio-economic rights. Some focused on civil and political rights not by deliberate choice but because of the avalanche of totalitarian and authoritarian regimes that reigned in most developing countries in the

³⁰⁵ See P Gifford ‘Book Review’ (2000) 30 *Journal of Religion in Africa* 494 495 (reviewing N Kasfir (ed) *Civil Society and Democracy in Africa: Critical Perspectives* (1998)).

³⁰⁶ See P Chabal ‘Introduction: Thinking About Politics in Africa’ in P Chabal (ed) *Political Domination in Africa: Reflections on the Limits of Power* (1986) 1. Cf JF Bayart ‘Civil Society in Africa’ in Chabal (above) 109 (discussing notions of the state and civil society as they relate to political development in Africa).

³⁰⁷ See M Bratton ‘Beyond the State: Civil Society and Associational Life in Africa’ (1989) 41 *World Politics* 407 411–12. See, in general, JL Comaroff & J Comaroff (eds) *Civil Society and the Political Imagination in Africa: Critical Perspectives* (1999) (presenting various scholars views on the implications of the civil society movement in Africa).

³⁰⁸ AU Act (note 286 above) pmb1.

1970s and 1980s.³⁰⁹ These regimes created their own antithesis in the form of NGOs; the struggle produced a synthesis of democratisation that now sweeps across many of these countries.

Given the dying dynasty of dictators in Africa, NGOs should refocus their advocacy and play a positive role in advancing social rights. Their demonstrated reluctance to advocate on these rights in the past contributed to their under-development. Yet, as Rubenstein argues, human rights NGOs can play a productive role in advancing socio-economic rights by collaborating with partner organisations in the developing countries in lobbying for systems of services that meet needs in a manner consistent with human rights requirements; by advocating for resources from wealthy countries to fulfil socio-economic rights; and by monitoring compliance by states with the increasingly explicit obligations, including core obligations to protect, respect, and fulfil socio-economic rights.³¹⁰

The landscape is gradually changing, with many NGOs beginning to pay closer attention to socio-economic rights. The International Commission of Jurists (ICJ)'s³¹¹ *Access to Justice Programme* is one example of the shifting paradigms in human rights advocacy. The programme offers financial assistance, skilled legal advice, and information and network support to local organizations and interested groups in order to help individuals and communities in Africa gain access to tribunals and redress social and

³⁰⁹ See NJ Udombana 'Articulating the Right to Democratic Governance in Africa (2003) 24 *Michigan Journal of International Law* 1209 1216 (stating, "between the Egyptian revolution in 1952 until 1998, Africa witnessed eighty-five coups or unconstitutional changes in government, seventy-eight of which took place between 1961 and 1997"). See also Van der ML 'Emerging Electoral Trends in the Light of Recent African Elections' (2001) 1 *African Human Rights Law Journal* 127 128.

³¹⁰ LS Rubenstein 'How International Human Rights Organizations Can Advance Economic, Social, and Cultural Rights: A Response to Kenneth Roth' (2004) 26 *Human Rights Quarterly* 845.

other socio-economic rights.³¹² These and similar initiatives must be acknowledged and commended. African NGOs should equally take up the challenge of advancing social rights in the continent.

CSOs should publicise the economic plights of citizens and positively engage governments towards implementation of social rights. They should share information and opinions with the different organs of governments and offer advice to legislative committees on issues affecting citizens' welfare. CSOs should not just think global and act local; they should, in Odinkalu's apt words, "think economic and act political [and] must be prepared to contemporaneously think global, think regional, think local and think the people".³¹³ The pace and process of political democratisation in Africa have opened up space for labour movements to influence policy-making for the benefit of workers. They should not allow the opportunity to slip them by. They should mobilise workers against policies that perpetuate poverty and not passively accept governments' macroeconomic policies and strategies, such as the refurbished SAPs in many states in the name of economic reforms. Africa took that road before, but its destination ended in destitution.

Labour unions should fight against casualisation of work by multinationals, which is increasingly becoming a neo-colonialist strategy to exploit Africans and perpetuate inequalities. They should also resist the growing privatisation and outsourcing of public service works, since the prospects of those retrenched finding alternative jobs are slim in

³¹¹ Information regarding this initiative is available on the ICJ website *available at* www.ICJ.org (last visited 5 Dec 2005).

³¹² See eg Kenyan Section of the International Commission of Jurists *available at* <http://www.icj-kenya.org/ahraj.asp> (last visited 5 Dec 2006).

³¹³ CA Odinkalu 'International Policies, African Realities: Human Rights and Democracy in Africa' (2000) *available at* www.africaaction.org/rtable/chi0002.htm.

an era of high unemployment. As stakeholders in Africa's economy, labour movements should also be cooperative in order to improve service deliveries by Africa's public servants. The patrimonial civil service is defined by absence of professionalism and by apathy, leading to many unauthorised absenteeism, lateness, idleness, and poor output.

Africa's workforce must play an instrumental role in economic growth; if not, it will become a mere mercenary force.³¹⁴ An ineffectual civil service is self-destructive; it is incapable of supporting economic growth and enhancing higher standards of living; and it is incapable of supporting those institutions that make the effective realisation of social rights possible. Labour movements should collaborate with their governments towards improving work ethics in the public service in order to increase productivity, raise private incomes, and enable the state to finance social insurance schemes. Freedom is not merely an individuals' autonomy, independence, or self-government; it includes efforts to realise an individual's potentials, which sometimes require help from others.³¹⁵

Africa's labour movements should also join their governments in the continuing campaigns for more debt relief and cancellation by Western countries and their "Clubs".³¹⁶ These unsustainable debts have deleterious effects on prospects for long-term

³¹⁴ Cf F Spagnoli *Homo Democraticus: On the Universal Desirability and the Not So Universal Possibility of Democracy and Human Rights* (2003) 417 (arguing, "you cannot make the best of your life and you cannot develop your possibilities when you focus on pleasure and desire and when you dislike the efforts necessary to develop").

³¹⁵ See above.

³¹⁶ In July 2005, the Group of Eight (G8) Industrial Countries, meeting in Gleneagles, United Kingdom, agreed to cancel the debt of the 18 poorest nations, 15 of which are in Africa. Under the deal brokered by British Prime Minister, Tony Blair, the G8 will fund debts to the World Bank and the ADB, while "existing IMF resources" will cater for debts owed to the IMF. The G8 also promised to boost aid for developing countries by \$50 billion (£28.8 billion), to provide rapid and flexible multilateral and bilateral debt relief for post-conflict countries and to allocate grant financing for reconstruction needs. See "The Gleneagles Communiqué" *BBC News UK Edition* (2005) available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/g8_gleneagles_communique.pdf [hereinafter Gleneagles Communiqué]; and "G8 Leaders Agree \$50bn Aid Boost" *BBC News UK Edition* 8 July 2005 available at <http://news.bbc.co.uk/1/hi/business/4662297.stm>. See, in general, Udombana "The Summer Has Ended" (note 303 above) 5 *et seq* (analysing the debt cancellation in the context of international development law).

economic growth and prosperity. The debt overhang is a human rights burden. It is the greatest threat to development, democracy, and the realisation of social rights in Africa. It undermines any marginal gains that aid may have brought to Africa, as the continent's foreign debts are serviced with foreign aid.³¹⁷ Increasingly, development funds are being diverted into loan repayments and, of course, to graft. So long as Africa is laden with the heavy yoke of debt, so long will the enterprise of reducing and ultimately eradicating poverty remain a mirage.³¹⁸ The struggle for debt cancellation in Africa must be waged from all fronts; and labour movements have a crucial role to play in mobilizing public opinion for this noble cause. Any opportunity to contribute in reducing Africa's handicaps towards self-fulfilment should not be wasted.

CSOs, in general, should check future reckless lending, borrowing, and spending in Africa and should monitor conditions, policies, and outcomes in both lending and borrowing countries. Eternal vigilance must remain the price of liberty because the hunger for abuse of power is never satisfied.

6.6 Conclusion

This illustrative Chapter maintains that the African Charter and other regional human rights instruments are unique for many reasons, not the least of which is their integration of all human rights and making them justiciable. These rights require positive and negative obligations on the part of states; and, no matter how they are phrased, states have obligations to respect, protect, promote, and fulfil social rights. Africa has made

³¹⁷ See T Ayodele *et al* 'African Perspectives on Aid: Foreign Assistance Will Not Pull Africa Out of Poverty' *Cato Institute Economic Development Bulletin* 14 Sept 2005 at 1 available at <http://www.cato.org/pubs/edb/edb2.pdf>.

³¹⁸ See Udombana 'The Summer Has Ended' (note 303 above) 33–34.

commendable progress in ratifying or acceding to regional and international human rights instruments, in constitutionalising social rights, and in initiating poverty reduction policies and programmes. The rapid efforts at integrating human rights into the political and economic policies and discourses of African states, at least *de jure*, is commendable, given their initial reluctance to embrace the culture of respect for human rights. Much, however, remains towards turning these positive statements of hopes into certainties.

Chapter Seven

SUMMARY AND CONCLUSION

This dissertation started on the premise that all human rights are indivisible and interdependent. It asserts that socio-economic rights are normative and rejects the viewpoints that these rights are non-justiciable. It further argues, to use King Jr., that “peoples everywhere can have three meals a day for their bodies, education and culture for their minds, and dignity, equality and freedom for their spirits”.¹ The thesis calls for an institutional paradigm shift that will move the discourse on rights from the realm of rhetoric to reality in Africa. It argues that Africa cannot actualise socio-economic rights unless all stakeholders take the indivisible human rights seriously.

The thesis identified states as not only stakeholders but also as primary human rights duty bearers. It examined the nature, including the minimum core contents, of obligations on socio-economic rights, and the inherent weaknesses of governance structures that encumber the realisation of these rights in Africa. It argues that a majority of Africa’s governments have not come to grips with their pivotal role in promoting economic and social conditions needed to reduce, if not eradicate, poverty; if and when they do, they will cease from propaganda and commence the real war against destitution and want. The starting point must be to strengthen institutions of governance and adopt measures that are conducive to the satisfaction of basic needs.

¹ ML King Jr ‘Acceptance Speech’ 10 Dec 1964 (on the occasion of the award of the Nobel Peace Prize in Oslo) *available at* <http://nobelprize.org/peace/laureates/1964/king-acceptance.html>.

The standard of living of a country has a strong positive influence on that country's propensity to experience and sustain democracy. In Africa, there is no *standard* to measure *living*, as absolute poverty still defines the continent. Yet, poverty is the greatest threat to peace, sustainable development, and democracy. There can be no lasting peace and democracy in a state of permanent hunger, where governments deliberately fail to secure the basic needs of citizens, whether male or female, children, or adults. The advancement of education and healthcare, the creation of jobs, the development of labour relations, and the securing of social security are essential preconditions for achieving social peace and establishing social democracy, which is an extension of political democracy. Otherwise stated, "It is only through a process of empowerment [of the people] that the future of a democratic Africa lies".²

Contemporary international law sees sovereignty as a normative concept of responsibility, requiring "a system of governance that is based on democratic and popular citizen participation, constructive management of social diversities, respect for fundamental human rights, an equitable distribution of national wealth, and opportunities for development".³ Since employment generation is a major route out of poverty in Africa, governments should place it at "the heart of the poverty battle".⁴ No state can sustain growing unemployment rates for long, because at some point, diminishing

² J Ihonvbere *Economic Crisis, Civil Society, and Democratization: The Case of Zambia* (1996) 284–85.

³ J Cilliers *Human Security in Africa: A Conceptual Framework For Review* (2004) 39. Cf NJ Udombana 'Articulating the Right to Democratic Governance in Africa' (2003) 24 *Michigan Journal of International Law* 1209 1212 ("International law is no longer the power base of a tyrant who rules directly by naked power or through the apparatus of a totalitarian political order. Its object of protection, in modern times, is the continuing capacity of a population to express and affect choices freely about the identities and policies of its governors."). See, in general, W Friedmann *The Changing Structure of International Law* (1964).

⁴ Economic Commission for Africa (ECA) *Economic Report on Africa 2005: Meeting the Challenges of Unemployment and Poverty in Africa* (2005) 92 [hereinafter ERA 2005].

demand will limit economic growth. On the other hand, the creation of decent work implies decreased poverty and provides the essential precondition for future economic growth. Reducing youth unemployment and utilising their high potential avoids what the International Labour Organisation (ILO) calls “the creation of a huge cadre of frustrated, uneducated or unemployable young people, which could have a devastating impact on long-term development prospects”.⁵

Judicial and quasi-judicial institutions have vertical obligations with the legislative and executive branches to advance *all* human rights through integrative and creative interpretations of relevant instruments. The development of a dynamic and coherent domestic jurisprudence that resonates with international standards and translates into tangible socio-economic rights enjoyment depends on judicial willingness to depart from outmoded interpretive methodologies. Thus, while the legislature and executive lay down broad frameworks on socio-economic rights, the judiciary should seize every opportunity to amplify their scope and, where necessary, give directives to public authorities on their implementation. The thesis has shown how some tribunals in Africa, both national and regional, are increasingly adopting a holistic interpretive methodology on socio-economic rights. The rest of Africa’s judiciary will do well to embrace this new interpretive paradigm, which could make a world of difference in securing human rights.

The state of human insecurity in Africa demands action by non-state entities, which requires a shift in orthodox human rights conceptions and the elaboration of a binding normative framework to constrain non-state actors. The prevailing tone and texture of contemporary life call for an international legal regulation of transnational corporations

⁵ ILO ‘Global Employment Trends 2004: Record Joblessness, But Relief May Be on the Way’ *World of Work Magazine* 27

(TNCs) and other non-state entities in order to provide a framework for a new international world order. Voluntary self-regulations are good, but they are no longer sufficient. There is really no principled reason for failing to attach binding obligations to these economic monsters for the entire spectrum of human rights. Pending the elaboration of such binding norms, however, TNCs must wake up to the clarion call to relieve poverty in Africa. “The private sector”, says Amalric, “should not only have a business interest in respecting legally binding human right[s] norms, but also a direct business interest in respecting non-binding norms and in protecting, promoting and fulfilling human rights in general”.⁶

Previous eras of globalisation did not adequately embed market forces within frameworks of rules and values that could secure the needs of humanity and the desire for social justice.⁷ As in the past, so it is now: contemporary globalisation aims at maximising profits, with little concern for human rights. Such a goal represents an unmet opportunity for a critical mass of humanity. The system of international law aids and abets this abnormality by sustaining an unequal relationship between a powerful North and a weak South or the so-called Third World,⁸ and by allowing TNCs and other privileged entities to violate the rights of the less privileged South with impunity. By

Apr 2004 *available at* <http://www.ilo.org/public/english/bureau/inf/magazine/50/get2003.htm>.

⁶ F Amalric *et al* ‘Transnational Corporations and Human Rights: The Business Implications’ *CCRS Working Paper Series* No 03/05 (2005) 3 *available at* <http://www.humanrights.ch/cms/upload/pdf/050504transnationalcorps.pdf>.

⁷ See J Ruggie Opening Statement to UN Human Rights Council Geneva 25 Sept 2006 *available at* <http://www.reports-and-materials.org/Ruggie-statement-to-UN-Human-Rights-Council-25-Sep-2006.pdf>.

⁸ See M Koskenniemi *From Apology to Utopia: The Structure of International Legal Argument* (Reissue with a New Epilogue 2005) 606-7. Cf M Bedjaoui *Towards a New International Economic Order* (1979) 50 (arguing that international law “consisted of a set of rules with a geographical basis (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and political aims (it was an imperialist law)”).

failing to provide adequate assistance to, and cooperation with, the weak, international law promotes transgressive rather than transformative and stabilizing ends.

A claim to human rights implies an imperative, nondiscretionary requirement that should trump uninhibited pursuit of economic interests, including the imperative to give a human face to globalisation. Human rights demand that economic activities should be rooted in procedural justice, in those crucibles that make for fairness and legitimacy of the “game”—transparency, accountability, and predictability. International law must take a sensible and sensitive stand on these imperatives, by prohibiting and enabling, restraining and empowering corporate human rights governance. Achieving this end entails reconstructing international law into a “language of beneficent transformation”,⁹ one that accommodates the growing threats that globalisation poses to human and peoples’ rights and that allows the poor and weak to take on the rich and powerful on equal terms.

It may well be that fighting poverty and adopting compensatory policies are, as Donnelly puts it, “functions of the state and not of the market”.¹⁰ Gewirth thinks that markets cannot guarantee sufficient funds to meet basic goods and opportunities, which “must be securely provided as needed” and, therefore, that “the state, as a community of rights, should be the primary, even if not the only, respondent of these rights”.¹¹ Others go even further and argue that “the business of business is business” and that corporations

⁹ Koskenniemi (note 8 above) 611.

¹⁰ J Donnelly ‘Ethics and International Human Rights’ in *Ethics and International Affairs* (2001) 153 (arguing that fighting poverty relates to justice, rights and obligations, rather than efficiency, and that “[m]arkets are simply unable to deal with them . . . because they have no vocation for this.”) Cf J Donnelly *International Human Rights* (1998) 160 (noting: “Markets seek efficiency and not social justice or human rights for all”).

¹¹ A Gewirth *The Community of Rights* (1996) 59.

should do no more than pursue the maximisation of shareholders' value.¹² All of these claims may be true, but it is disingenuous to insist on a watertight compartment of responsibilities in an increasingly interdependent world. As Sen convincingly argues, “while much can be done [to reduce poverty] through sensible government policy, it is important to integrate the role of the government with the efficient functioning of the economic and social institutions—varying from trade, commerce and the markets to active functioning of political parties, ...”¹³

Economic pursuits are not inherently immoral; indeed, “the more immediate case for the freedom of market transaction lies in the basic importance of that freedom itself. We have good reasons to buy and sell, to exchange, and to seek lives that can flourish on the basis of transactions”.¹⁴ This insight accords with Aristotle’s clear diagnosis: “wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else”,¹⁵ which is “the good of human beings”.¹⁶ If human flourishing is the principal goal of economic choices, then TNCs, being dominant global actors, should work to improve the social welfare of persons within their sphere of influence. Such a cause makes inordinately good business sense, since the stability of markets depends on the latter joining in the crusade to eradicate poverty.

¹² Amalric *et al* (note 6 above) 1 (*quoting* Milton Friedman 1970).

¹³ A Sen *Development as Freedom* (1999) 162.

¹⁴ Above, 112 (adding: “To deny that freedom [of markets] in general would be in itself a major failing of a society.”).

¹⁵ Aristotle *Nicomachean Ethics* (D Ross trans 1980) bk I sec 5 para 7.

¹⁶ Above, bk I sec 7. Cf K Marx *The Economic and Philosophic Manuscript* (1884) (arguing for a reorientation of economic preoccupations).

In Nigeria's Niger Delta, the Government's and TNCs' abilities to stifle one form of protest—litigation—has led to different, more troublesome, forms of protest.¹⁷ 'Like play, like play,' as Africans would say, an "inconsequential" teething problem has deepened into septic abscesses. After years of skulking in the shadows to bemoan the plundering of their land, the Niger Delta youth now embarks on a sustained and brutal military campaign against Nigeria's oil industrial complex. They routinely abduct and murder local and foreign oil workers (some are released after payment of huge ransom), blow up flow stations at will, and detonate explosions like Christmas crackers.¹⁸ Such dreadful violence is the militants' way of imposing sanctions on usurpers of their natural wealth and resources. For them, any means to recover what has been unfairly appropriated is a fair game. Their brutalities have forced oil consortiums to significantly cut production,¹⁹ with consequent loss of revenue, while simultaneously breeding paranoia and a culture of vengeance. Caught in this crossfire are ordinary citizens who daily straggle and struggle to earn a living under an insupportable system.

The illustrative study on the rights to work and social security underscores the potential that could exist for realising socio-economic rights if all stakeholders—states and non-state actors, including judicial institutions and civil society organisations—unite

¹⁷ See JG Frynas *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (2000) 226.

¹⁸ See eg S James & C Amanze-Nwachukwu 'Militants Storm Shell Facility, Kill Two' *This Day* [Nig] 16 Dec 2006 available at <http://www.thisdayonline.com/nview.php?id=65841> (reporting on how Niger Delta militant youths attacked a Nigerian military formation at the Nun River Flow Station of Shell Petroleum at Oporoma, Bayelsa State, killing "at least two soldiers" with several others wounded and three oil workers held hostage"); C Amanze-Nwachuku & A Ogbu 'Militants Bomb Shell, Agip in Port Harcourt' *This Day* [Nig] 19 Dec 2006 available at <http://www.thisdayonline.com/nview.php?id=66104> ("True to their threats of a massive onslaught on multi-national oil companies in the Niger Delta, suspected militants yesterday beat the water tight security by Shell Petroleum Development Company and bombed the residential area.").

¹⁹ See 'Shell's Nigeria Output Cut by 20%' *BBC News Online* 13 Jan 2006 available at <http://news.bbc.co.uk/2/hi/business/4608702.stm> (reporting that Shell has cut its Nigeria oil output after a pipeline explosion and the kidnapping of four foreign oil workers).

their wills and strengths to advance all human rights. The African Union (AU) and its organs have special roles to play in promoting socio-economic rights in Africa, since improving living standards in Africa is one of AU's goals.

Some think that Africa is predestined to be poor, that some long-lost ancient curses cause its poverty and failures. These troubling, reckless, and irritating assertions have contributed to Africa's inadequate self-image in the comity of nations. Those who make these false claims fail to acknowledge that Africa was the cradle of civilisation²⁰ and that ancient Egypt provided the first reliable system of irrigation known to mankind, besides its skills in architecture, writing and painting.²¹ Understanding and appreciating Africa's contribution to human existence is a part of the process of reconstructing the identity and self-confidence of its peoples.²² Africa's poverty is not a strand in the tapestry of primordial causation. Many of the continent's difficulties are home-made and, from a universal perspective, wholly unnecessary. It is the lack of visionary leadership or the pursuit of an alien vision that accounts for Africa's inability to harness its abundant human and natural resources to lift its citizens out of economic scarcity.

The poverty of leadership in Africa has persisted largely due to the poverty of the constituency. Africans have been so accustomed to the diffused darkness of dictatorship and tyranny that they find it difficult to raise themselves up to the penetrating lights of democracy and good governance. This indifference is understandable. When one lives

²⁰ AU Commission *Africa Our Common Destiny: Guideline Documents* (2004) 3 ("Africa was the birthplace and source of civilization for the longest period in the history of humanity, a period that people persist in describing wrongly, as "Prehistoric" using one sole criterion—'lack of written records'"). See also New Partnership for Africa's Development (NEPAD) (2001) para 4 ("Modern science recognizes Africa as the cradle of humankind . . . Africa's status as the birthplace of humanity should be cherished by the whole world as the origin of all its peoples.").

²¹ See, in general, G Guest *The March of Civilization* (1974).

²² See NEPAD (note 20 above) para 14.

everyday in the midst of absurdity, it becomes far easy to behave respectfully to it. Notwithstanding, Africans have a right to demand that their continent should no longer be an exception to the rule. People protect themselves by rising in defence of the rule of law. Africans can shape the character of leadership and, *a fortiori*, their future destiny by not sweeping fundamental issues under the carpet. It is patently wrong to leave the task of saving Africa to some pseudo messiahs or opportunistic foreign powers.

This thesis concludes on a hopeful note. (Africa needs hope if it is to summon the courage to work for human survival.) We believe that Africa is not a lost cause, despite current challenges in realising human security. We believe that the human entity is endowed with intelligence and vision to regulate its conduct and constantly recreate its existence and that Africa is not an exception. We believe, finally, that the stigma of a universal black and African failure—the so-called Afro-pessimism—will melt away when all stakeholders begin to work towards reconstructing the continent through new institutional and other paradigms.

Key Terms:

Negative and positive rights; Normativity; Justiciability; Indivisibility and interdependence; *Pacta sunt servanda*; Progressive realisation and minimum core; Socio-economic rights and interpretive methodologies; State structures and socio-economic rights; Non-state actors; corporate social responsibilities; Globalization and economic reforms; Sustainable development

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